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No. 00-758-CFX Title: United States Postal Service, Petitioner
v.
Maria A. Gregory

Docketed: November 13, 2000 Court: United States Court of Appeals for the Federal Circuit

Entry	Date	Proceedings and Orders
	Sep 29 2000	Application (00A274) to extend the time to file a petition for a writ of certiorari from October 11, 2000 to November 10, 2000, submitted to The Chief Justice.
	Oct 2 2000	Application (00A274) granted by the Chief Justice extending the time to file until November 13, 2000.
	Nov 13 2000	Petition for writ of certiorari filed. (Response due January 12, 2001)
	Nov 30 2000	Order extending time to file response to petition until January 12, 2001.
	Jan 12 2001	Brief of respondent Maria A. Gregory in opposition filed.
	Jan 12 2001	LODGING consisting of ten copies of two documents submitted by counsel for the respondent.
	Jan 24 2001	DISTRIBUTED for Conference of February 16, 2001
	Jan 25 2001	Reply brief of petitioner United State Postal Service filed.
	Feb 20 2001	Petition GRANTED. SET FOR ARGUMENT October 9, 2001. **********
	Mar 30 2001	Order extending time to file the joint appendix and petitioner's brief on the merits to and including April 27, 2001.
	Apr 25 2001	Order extending time to file respondent's brief on the merits to and including June 28, 2001.
	Apr 27 2001	Joint appendix filed.
	Apr 27 2001	Brief of petitioner United State Postal Service filed.
	Jun 28 2001	Brief amicus curiae of National Association of Letter Carriers, AFL-CIO filed.
	Jun 28 2001	Lodging consisting of twenty bound copies of one complete set of the unpublished arbitration awards submitted by counsel for amici, NALC.
	Jun 28 2001	Brief of respondent Maria A. Gregory filed.
	Jun 28 2001	LODGING consisting of twenty sets of four arbitral decisions cited in the brief, and submitted by counsel for the respondent.
	Jun 28 2001	Brief amicus curiae of National Employment Lawyers Association filed.
	Jun 28 2001	Brief amicus curiae of Government Employees, AFL-CIO filed.
	Jun 29 2001	Brief amicus curiae of National Treasury Employees Union filed.
	Jul 12 2001	Record filed.
	Jul 20 2001	CIRCULATED.
	Jul 25 2001	Record filed.
	Aug 2 2001	Reply brief of petitioner United State Postal Service filed.
	Oct 9 2001	ARGUED.

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No.

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

MARIA A. GREGORY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal agency, when disciplining or removing an employee for misconduct pursuant to the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, may take account of prior disciplinary actions that are the subject of pending grievance proceedings.

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In the Supreme Court of the United States

No.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States Postal Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 212 F.3d 1296. The opinion of the Merit Systems Protection Board (App., *infra*, 9a-12a) is unpublished, but the decision is noted at 84 M.S.P.R. 619 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2000. A petition for rehearing was denied on July 13, 2000 (App., *infra*, 44a). On October 2, 2000, the Chief Justice extended the time for filing a petition for

a writ of certiorari to and including November 13, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*), are reproduced at App., *infra*, 45a-58a.

STATEMENT

1. Respondent worked for the United States Postal Service (Postal Service) as a Letter Technician in Hinesville, Georgia. App., *infra*, 1a. The Postal Service disciplined respondent on three separate occasions between May 1997 and August 1997. On May 13, 1997, respondent received a letter of warning for insubordination after she left work for a doctor's appointment without first putting her day's mail in order. *Id.* at 2a, 36a. Less than a month later, on June 7, 1997, respondent received a seven-day suspension for delaying the mail and failing to follow instructions. *Id.* at 2a. Two months later, on August 7, 1997, respondent received a 14-day suspension for delaying the mail, claiming unauthorized overtime, failing to follow instructions, and performing her duties in an unsatisfactory manner. *Ibid.* The union representing respondent filed grievances challenging each of those three disciplinary actions.

On September 13, 1997, respondent requested 3.5 hours of overtime (or assistance from another letter carrier) to prepare and deliver the mail on her route. App., *infra*, 14a. That request "seemed like a gross overestimate" to respondent's supervisor. *Id.* at 17a. The supervisor later testified that respondent had "a low volume of mail" on the day in question; that he could not recall another request for so much overtime

during a non-holiday period; and that any request for more than two hours of overtime "sends up a red flag." *Ibid.* After respondent reaffirmed her estimate of 3.5 hours overtime, the supervisor reassigned some of respondent's mail to other letter carriers and accompanied respondent on her route. *Id.* at 17a-18a. The supervisor observed no unusual conditions on the route. Respondent also did not appear to suffer from any physical impairment. *Id.* at 18a-19a. Based upon his observations and the amount of time taken by respondent and the other letter carriers, the supervisor charged respondent with overestimating her time by 1.5 hours. *Id.* at 15a, 29a. Letter carriers are responsible for correctly estimating the amount of time they will need to complete their work on a given day, within a margin of error of 15 to 20 minutes. *Id.* at 16a.

The supervisor proposed that respondent be removed from service and a personnel officer upheld that removal. App., *infra*, 2a. The Postal Service dismissed respondent effective November 26, 1997. *Id.* at 13a.

2. After two days of hearings, an administrative judge of the Merit Systems Protection Board (MSPB) affirmed respondent's dismissal. App., *infra*, 13a-43a. The administrative judge upheld the Postal Service's finding that respondent had failed to perform her duties in a satisfactory manner (*id.* at 14a-30a), and rejected respondent's affirmative defenses of discrimination. *Id.* at 30a-35a.

The administrative judge also upheld the penalty of removal from service. App., *infra*, 36a. In deciding to remove respondent, the Postal Service relied upon the nature of the charge, "the fact that there was no room for [respondent's overestimate] to have been a mistake," and respondent's history of similar offenses. *Ibid.* The administrative judge noted that because prior

disciplinary actions against respondent were in writing, had been made a part of the record, and respondent had an opportunity to grieve them, review of those earlier actions was limited under MSPB precedent to determining whether the earlier actions were clearly erroneous. *Id.* at 37a (citing *Bolling* v. *Department of the Air Force*, 8 M.S.P.B. 658, 659-661 (1981)). Respondent had not argued in the removal proceeding that the Postal Service's earlier disciplinary actions were improper. Nevertheless, the administrative judge reviewed the earlier actions on which the Postal Service relied and found that they were not clearly erroneous. *Ibid.* The administrative judge further found that respondent's removal, although seemingly harsh "[a]t first blush" (*ibid.*), was "within the bounds of reasonableness" (*id.* at 39a) given respondent's "pattern of [mis]conduct" (*id.* at 38a); respondent's calculated submission of an inflated overtime request to earn undeserved pay or lessen her workload (*ibid.*); and respondent's own testimony indicating that she "has little potential for rehabilitation" (*id.* at 39a).

3. Respondent petitioned the MSPB for review of the administrative judge's decision. In July 1999, while respondent's petition for review was pending, an arbitrator ruled in favor of respondent with respect to the first disciplinary action taken against her—the May 1997 letter of warning for insubordination—and ordered it expunged from respondent's disciplinary record. App., *infra*, 5a. The MSPB was not advised of the arbitrator's decision, however. It denied respondent's petition for review, in part on the ground that respondent had not provided any "new, previously unavailable, evidence." *Id.* at 9a-10a.

4. The United States Court of Appeals for the Federal Circuit, exercising jurisdiction pursuant to

5 U.S.C. 7703 and 28 U.S.C. 1295(a)(9), affirmed in part, vacated in part, and remanded for further proceedings. App., *infra*, 1a-8a. Deciding the case without argument, the court of appeals affirmed the MSPB's determination that respondent failed to perform her duties in a satisfactory manner. The court of appeals also affirmed the MSPB's rejection of respondent's discrimination claims. *Id.* at 4a-5a. But the court of appeals reversed the MSPB's approval of the removal penalty. The court took judicial notice that the arbitrator had overturned the Postal Service's May 7, 1997, letter of warning to respondent, and that other challenges to respondent's disciplinary record were pending. *Id.* at 5a-6a. In light of these facts, the court of appeals held "that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." *Id.* at 7a. The court reasoned that consideration of earlier disciplinary actions that are subject to a pending challenge "would risk harming the legitimacy of the reasonable penalty analysis, by allowing the use of unreliable evidence (the ongoing prior disciplinary actions) to support an agency action." *Ibid.* The court remanded to the MSPB for a determination whether (1) the case should be sent back to the Postal Service, or (2) the MSPB itself should set a new penalty. *Id.* at 7a-8a.

On July 13, 2000, the court of appeals denied the Postal Service's petition for rehearing.

REASONS FOR GRANTING THE PETITION

The court of appeals has incorrectly decided a question of considerable importance to the federal government and federal employees. The court of appeals' decision finds no support in the civil service laws or in due process. To the contrary, the longstanding admin-

istrative procedures overturned by the court of appeals fully protect the statutory and constitutional rights of federal employees and the reliability of agency determinations.

The court of appeals' decision fails to give appropriate deference to the MSPB's statutory responsibility for reconciling the twin goals of efficiency in the civil service and fairness to federal employees. See generally *United States* v. *Fausto*, 484 U.S. 439, 444-447 (1988). If it is allowed to stand, the court of appeals' decision will result in a less efficient civil service and greater administrative costs, without any substantial increase in fairness to employees. The court of appeals recognized that the employee's disciplinary history is "an important factor when considering whether a particular penalty [for misconduct] is reasonable." App., *infra*, 6a. Yet, overturning decades of consistent administrative practice, the court of appeals precluded federal employers and the MSPB from considering highly relevant disciplinary histories in many cases. The court of appeals' new rule creates a strong incentive for employees who are subject to discipline to file grievances and prolong grievance proceedings, solely to protect against possible future discipline. At the same time, the new rule may discourage federal agencies from retaining and seeking to rehabilitate employees who are subject to dismissal, because it may be impossible to discharge a recidivist employee if efforts at rehabilitation fail. As a result of the Federal Circuit's exclusive jurisdiction over appeals from decisions of the MSPB (see 5 U.S.C. 7703), the issue in this case is unlikely to be presented to any other court of appeals. Indeed, the issue is unlikely to arise again in the Federal Circuit, because the MSPB will apply the ruling of the court of appeals, and the government (unlike its

employees) does not have an automatic right of appeal from adverse MSPB decisions. 5 U.S.C. 7703(a)(1); 5 U.S.C. 7703(d) (1994 & Supp. IV 1998).

Because the court of appeals' decision threatens to do substantial damage to the civil service and represents an unjustifiable judicial intrusion into federal employee discipline, further review is warranted.[1]

1. The Civil Service Reform Act of 1978 (Reform Act), Pub. L. 95-454, 92 Stat. 1111, comprehensively revised the statutory rights and obligations of federal civil servants. *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. at 91. Among Congress's purposes in enacting that reform was "preserv[ing] the ability of federal managers to maintain 'an effective and efficient Government,'" a goal that Congress pursued through new provisions covering removal and discipline of employees for unacceptable performance or misconduct. *Cornelius* v. *Nutt*, 472 U.S. at 650-651 (quoting 5 U.S.C. 7101(b)). In particular, Congress wanted "to give agencies greater ability to remove or discipline expeditiously employees who engage in misconduct, or whose work performance is unacceptable." *Id.* at 662-663 (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 51 (1978)).

To achieve Congress's goals, the Reform Act provides agencies primary discretion to take disciplinary action that will most effectively address an employee's

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[1] This Court has often recognized that a possible misapplication of the federal civil service laws by the court of appeals is sufficiently important to warrant review. See, *e.g.*, *LaChance* v. *Erickson*, 522 U.S. 262 (1998); *Carlucci* v. *Doe*, 488 U.S. 93 (1988); *Fausto*, *supra*; *Department of Navy* v. *Egan*, 484 U.S. 518 (1988); *Cornelius* v. *Nutt*, 472 U.S. 648 (1985); see also *Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, 464 U.S. 89 (1983); *Bush* v. *Lucas*, 462 U.S. 367 (1983).

misconduct. Sections 7512 and 7513 of Title 5 provide that an agency may take adverse action against a covered employee—including removal, suspension of more than 14 days, demotion, or a furlough—"for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a).[2] The employee, however, is entitled to four specific procedural protections: (1) advance written notice of the proposed employment action; (2) a reasonable time to respond; (3) counsel or another chosen representative; and (4) a written decision providing specific reasons for the agency's action. 5 U.S.C. 7513(b) and (c). "Thus, on the one hand, the Reform Act strives to enable government managers to more effectively hire, fire, and otherwise discipline their employees, while at the same time according employees their requisite procedural protections." *LaChance* v. *Devall*, 178 F.3d 1246, 1254 (Fed. Cir. 1999).

An employee who receives a suspension of more than 14 days, or another serious sanction such as removal, may appeal the agency's decision to the MSPB.[3] 5 U.S.C. 7513(d). The MSPB must sustain the agency's decision if the decision is supported by a preponderance of the evidence and the employee does not show that the decision was infected by "harmful error in the application of the agency's procedures," a specifically prohibited employment practice such as discrimination, or

[2] Respondent qualifies as a covered employee under 5 U.S.C. 7511(a)(1)(B)(ii) and (b)(8). Pertinent provisions of the Reform Act also apply to respondent pursuant to 39 U.S.C. 1005(a)(1) and (2).

[3] Section 7503 of Title 5 establishes procedures for suspensions of 14 days or less. Section 7503 affords employees accused of less serious offenses fundamentally the same procedural protections guaranteed by Section 7513: notice, an opportunity to respond, representation, and a written decision. The employee, however, does not have a right of appeal.

another violation of law. 5 U.S.C. 7701(c). The MSPB may alter the agency's designated penalty if the penalty exceeds the bounds of reasonableness. *Devall*, *supra*; *Douglas* v. *Veterans Admin.*, 5 M.S.P.B. 313, 314-324 (1981).

An employee aggrieved by the MSPB's decision may appeal to the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over such appeals. 5 U.S.C. 7703; 28 U.S.C. 1295(a)(9). The court of appeals will reverse MSPB decisions that are: "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. 7703(c). The court of appeals has recognized, however, that fixing the appropriate penalty for employee misconduct "is a matter committed primarily and largely to the discretion of the agency." *Hagmeyer* v. *Department of Treasury*, 757 F.2d 1281, 1284 (Fed. Cir. 1985). Accordingly, the court of appeals "will normally defer to the judgment of the agency as to the appropriate penalty for employee misconduct unless the severity appears totally unwarranted." *Id.* at 1284-1285.

2. The new rule announced by the court of appeals in this case—that "consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits" (App., *infra*, 7a) —contradicts two decades of consistent administrative practice that faithfully implemented the Reform Act's procedures for employee discipline.

The MSPB's decision in *Douglas*, *supra*, issued in 1981, established standards to guide the agencies' exercise of their broad discretion to select appropriate discipline. Drawing upon judicial and administrative

precedent, the MSPB identified a non-exhaustive list of twelve factors that are "generally recognized as relevant" to the penalty determination. 5 M.S.P.B. at 331. Among those factors are the employee's disciplinary record and potential for rehabilitation. *Id.* at 332. When setting a disciplinary penalty, the agency must "consider the relevant factors and * * * strike a responsible balance within tolerable limits of reasonableness." *Id.* at 332-333.

Later in 1981, the MSPB addressed the question presented by this case: Under what circumstances may prior disciplinary action be reopened or disregarded in the course of later disciplinary proceedings? See *Bolling* v. *Department of Air Force*, 8 M.S.P.B. 658 (1981). To answer that question, the MSPB looked to regulations that formerly had governed the Civil Service Commission.[4] Adopting the pre-existing administrative rule, the MSPB held that when it reviews a disciplinary action that is premised upon the employee's disciplinary record, the disciplinary record is itself a proper subject of review.[5] *Id.* at 658-659.

The level of review depends upon the procedural protections afforded the employee in the earlier disciplinary action that the employee collaterally attacks. Specifically, the MSPB looks for three procedural safeguards in the earlier action: (1) whether the employee was informed of the action in writing; (2) whether the employee was given an opportunity to dispute the action before a higher authority; and (3) whether the action is a matter of record. 8 M.S.P.B. at 659, 660-661. If one or more of those protections is absent, then the MSPB undertakes "a full, de novo review" of the earlier action as part of its review of the later disciplinary decision. *Id.* at 659. But, if all three safeguards are present, then the MSPB will overturn the prior action only if the employee can show, based upon the existing record gathered in the earlier proceeding, that the earlier action was clearly erroneous. *Id.* at 660-661. The MSPB determined that its approach

> strikes a reasonable and workable balance between the competing interests involved * * *. On the one hand, an appellant is not allowed to relitigate issues that either were, or could have been thoroughly litigated previously. On the other hand, agencies are not able to utilize clearly erroneous prior actions as aggravating factors so as to enhance the penalties imposed.

Id. at 660. The MSPB has consistently applied the rules of decision set out in *Bolling*. *E.g.*, *Crawford* v. *Department of Justice*, 45 M.S.P.R. 234, 236 n.1 (1990) (citing cases); *Holland* v. *Department of Defense*, 83 M.S.P.R. 317, 320-322 (1999).

Pursuant to *Bolling*, the MSPB reviews disciplinary actions in the employee's record for clear error even when, as here, these actions are the subject of a pending arbitral grievance. An earlier agency action that has not been overturned and was procedurally regular

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[4] "The [MSPB] was created to assume the adjudicatory functions of the old [Civil Service] Commission and, with certain exceptions, those functions passed unchanged from the Commission to the [MSPB]." *Department of Navy* v. *Egan*, 484 U.S. at 531 n.6. Among those functions inherited by the MSPB was review of agency-imposed discipline. In *Douglas*, the MSPB held that it has the same authority to review disciplinary penalties as the Civil Service Commission possessed. 5 M.S.P.B. at 314-324.

[5] The Court of Claims recognized and applied that administrative policy. *Bredehorst* v. *United States*, 677 F.2d 87, 90 (Ct. Cl. 1982); *Swentek* v. *United States*, 658 F.2d 791, 794-796 (Ct. Cl. 1981); *Webb* v. *United States*, 227 Ct. Cl. 777 (1981).

enjoys "the presumption of honesty and integrity which accompanies administrative adjudicators;"[6] the action is given effect, notwithstanding the pending grievance, unless it is clearly erroneous or subject to de novo review. *Hubbard* v. *United States Postal Serv.*, 32 M.S.P.R. 505, 508 (1987).[7]

The employee, however, may introduce evidence that the earlier disciplinary action has been overturned as a result of the employee's grievance. In that situation, the reversal overcomes the presumption that the earlier disciplinary action is valid, and precludes reliance upon it. *Jones* v. *Department of Air Force*, 24 M.S.P.R. 429, 431 (1984).

3. The longstanding *Bolling* approach, as applied by the MSPB in this case, is entirely consistent with the protections afforded federal employees under the Reform Act, and reasonably accommodates the competing interests of government efficiency and employee due process. The Reform Act's notice and hearing requirements establish an "elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—

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[6] See generally *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 101 (1949) ("An administrative order is presumptively valid."); *Coleman* v. *Paccar Inc.*, 424 U.S. 1301, 1306 (Rehnquist, Circuit Justice 1976) (noting "the time-honored presumption in favor of the validity of" agency determinations).

[7] See also *Morgan* v. *Department of Defense*, 63 M.S.P.R. 58, 61 (1994) ("the pending grievance is considered a challenge to the action," which the MSPB reviews under *Bolling*); *Freeman* v. *Department of Transp.*, 20 M.S.P.R. 290, 292 (1984) (subject to *Bolling* review, "an agency may rely on a record of past discipline even where a prior disciplinary action is the subject of a pending grievance"); *Carr* v. *Department of Air Force*, 9 M.S.P.B. 714, 715 (1982) (same).

administrative and judicial—by which improper action may be redressed." *Bush* v. *Lucas*, 462 U.S. at 385. And the *Bolling* rule ensures that employees are not denied the "carefully delineated rights" to notice and a hearing that Congress afforded through this scheme. *LaChance* v. *Erickson*, 522 U.S. at 266.

As discussed above, the Reform Act entitles employees facing adverse action to written notice of the proposed action, an opportunity to respond, and a written decision giving reasons for the action. 5 U.S.C. 7503, 7513; cf. *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532 (1985) (discussing due process requirements applicable to termination of public employee). *Bolling* protects those rights. If, in a prior disciplinary action, the employee was not afforded written notice, an opportunity for review by a different authority, or a record decision, then the presumption of validity does not apply to the prior action and the employee is entitled to de novo review. The MSPB applies a presumption of validity to the employee's disciplinary record only after it determines that the employee received those three procedural protections. Even then, the MSPB reviews the relevant administrative record for clear error. *Bolling*, 8 M.S.P.B. at 659-661; see also *Hubbard*, 32 M.S.P.R. at 508-509. Accordingly, any material aspect of the employee's disciplinary record that has not been developed in accordance with the key procedural protections, is subject to de novo review by the Board.

There will be cases, such as this one, in which a procedurally regular agency determination that forms part of the employee's disciplinary record, and is relied upon by the agency, is later reversed. But the MSPB has accommodated those cases as well. If the employee

takes an appeal to the MSPB, and the prior action is reversed before the MSPB renders its decision, then the MSPB will strike the prior action from the employee's disciplinary record and overturn any reliance upon it. *Jones*, 24 M.S.P.R. at 431. Thus, respondent could have brought the arbitrator's July 1999 decision overturning the Postal Service's May 1997 letter of warning to the attention of the MSPB in connection with her petition for review of the administrative judge's decision. The arbitrator's decision would have qualified as new, previously unavailable evidence, which would have supported granting her petition. 5 C.F.R. 1201.115(d)(1) (MSPB may grant a petition for review when "[n]ew and material evidence is available that, despite due diligence, was not available when the record closed").

The MSPB also has discretion to reopen its decision in the event that the employee's disciplinary record is revised materially *after* the MSPB affirms the challenged disciplinary action. 5 C.F.R. 1201.118 ("The Board may reopen an appeal and reconsider a decision of a judge on its own motion at any time, regardless of any other provisions of this part."). The MSPB's discretionary power to reopen provides the employee fair opportunity to have the agency's sanction re-evaluated when a relevant grievance is not timely resolved. Cf. *Payne* v. *United States Postal Serv.*, 69 M.S.P.R. 503, 505-508 (1996) (reopening "in the interests of justice" where employee's criminal conviction was reversed after MSPB upheld employee's removal in light of the conviction).

4. The rule adopted by the court of appeals, if permitted to stand, would do serious harm to the civil service system, which includes more than two million federal employees. The rule significantly limits the

ability of federal agencies to issue appropriate discipline. In all likelihood, the rule announced by the court of appeals works to the detriment of most affected employees as well.

a. The rule announced by the court of appeals seriously impairs federal agencies' authority and discretion to calibrate disciplinary action to the circumstances presented by the employee's record, and thereby undermines the statutory goal of "promot[ing] the efficiency of the service." 5 U.S.C. 7513(a). Even when removal or a long suspension would be reasonable, a supervisor may deem it best for the efficiency of the service to impose a lesser penalty, such as a short suspension or letter of reprimand. Repetition of the same or related infractions would lead to more severe penalties, including removal if the employee refuses to correct his or her conduct. When supervisors use that approach (known in private-sector labor relations as "progressive discipline"), employees benefit from additional notice of workplace problems and an opportunity to correct deficiencies prior to termination. For its part, the agency has the flexibility to address recidivism if it occurs.

That flexible approach, however, assumes review of the employee's disciplinary history. Indeed, the employee's disciplinary history is one of the factors federal agencies generally *must* consider when setting a penalty. *Douglas*, 5 M.S.P.B. at 332. If pending grievances precluded an agency from taking account of past disciplinary actions for, say, unexcused absences, then the agency could not punish a second, third, or tenth absence more severely than a first absence. The most recent charge, even if part of a pattern of similar misconduct, would have to be considered in a vacuum. The decision of the court of appeals would thus prevent

agencies from sensibly disciplining habitual offenders whose instances of misconduct, considered in isolation, do not warrant a serious penalty.

The problem of excluding recent disciplinary actions from consideration is all the more acute because federal agencies' disciplinary guidelines commonly limit the use of prior disciplinary actions that are stale. For example, Department of Defense Administrative Instruction No. 8 (Aug. 17, 1981), which applies to employees under the Secretary of Defense and the Joint Chiefs of Staff, provides for consideration of past suspensions only if they occurred within the last three years, and of past reprimands and admonishments only if they occurred within the last two years. Grievance proceedings, however, may take years to resolve. By the time a valid disciplinary action is upheld and thus rendered cognizable by the court of appeals, it may be too old to consider. Employees may be able to preclude *any* future consideration of a disciplinary action, simply by filing a grievance.[8] Thus, in practical effect, the court of

[8] In this case, the arbitrator overturned respondent's May 1997 letter of warning more than two years later, in July 1999. App., *infra*, 5a. Respondent's grievances challenging the June 1997 and August 1997 suspensions still are pending after more than three years. Yet, the collective bargaining agreement governing respondent's employment with the Postal Service provided that "[t]he records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years." Agreement Between United States Postal Service and National Association of Letter Carriers, AFL-CIO (1994-1998) art. 16:10. If respondent's misconduct during 1997 could not be considered within two years of its occurrence because of the pending grievances, and could not be considered thereafter under the collective bargaining agreement, then this misconduct might never be eligible for consideration in any disciplinary proceeding.

appeals' decision is at odds with the court's own recognition "that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given circumstances." App., *infra*, 6a.

The possibility also exists that federal supervisors, being unable to implement discipline based upon the employee's full record, may impose a more severe (but nevertheless reasonable) penalty for a first offense, rather than imposing a less severe penalty in the hope that the employee's conduct will improve. Such an outcome could increase turnover and discontent among federal employees, also compromising "the efficiency of the service." 5 U.S.C. 7513(a). Indeed, by establishing an apparently unqualified rule that "as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits," App., *infra*, 7a, the court of appeals unnecessarily limited the ability of the MSPB and federal agencies to develop procedures that address the court of appeals' underlying concerns, yet also respect the needs of an efficient civil service system. Cf. *National Fed'n of Fed. Employees, Local 1309* v. *Department of Interior*, 526 U.S. 86, 99-101 (1999) (remanding to give Federal Labor Relations Authority the opportunity to address federal labor issue in light of Court's statutory construction).

b. The decision of the court of appeals immunizes employees from cumulative discipline so long as a grievance is pending. This immunity will encourage employees to challenge all disciplinary actions, even relatively minor ones. It will also give employees an

incentive to prolong grievance proceedings. The decision below thus will increase the administrative burden on federal agencies and undermine processes for the efficient resolution of disputes. The dockets of the MSPB and, ultimately, the Federal Circuit also will be burdened with strategic appeals brought to protect against possible future discipline. The decision below, if allowed to stand, will upset Congress's plan for a system of administrative and judicial review that "balance[s] the legitimate interests of * * * federal employees with the needs of sound and efficient administration." *Fausto*, 484 U.S. at 445.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2000

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 00-3123

MARIA A. GREGORY, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

[Decided: May 15, 2000
Rehearing Denied: July 13, 2000]

Before: MAYER, Chief Judge, CLEVENGER, and GAJARSA, Circuit Judges.

CLEVENGER, *Circuit Judge.*

Maria A. Gregory was fired from her position as a Letter Technician with the United States Postal Service ("Postal Service") in Hinesville, Georgia, because she allegedly overestimated the delivery time of her route by about an hour and a half. The Merit Systems Protection Board ("Board") rejected Ms. Gregory's appeal, holding that the penalty of removal was justified by Ms. Gregory's prior disciplinary record, part of which was the subject of then-current administrative grievance proceedings. *See Gregory* v. *United States Postal Serv.*, No. AT075298261-I-1, slip op. at 19 (Sept. 11, 1999). Because prior disciplinary actions that are subject to ongoing proceedings may not be used to

support the reasonableness of a penalty, we affirm-in-part, vacate-in-part and remand for further proceedings.

I

On September 13, 1997, Ms. Gregory requested 3.5 hours of overtime or assistance in completing her mail route. Her supervisor, questioning whether the overtime was required, nonetheless granted her three hours of assistance. Indeed, Ms. Gregory's supervisor, William J. Cox, provided the assistance and accompanied Ms. Gregory himself. Mr. Cox, keeping precise records of Ms. Gregory's activities that day, alleged that Ms. Gregory overestimated the amount of time or assistance she needed by about 1.3 hours, and undertook disciplinary action on that basis. The Postal Service proposed to remove Ms. Gregory for this offense ("failure to perform duties in a satisfactory manner") based in part upon Ms. Gregory's prior disciplinary record, which (at that time) contained the following: (1) a May 13, 1997, Letter of Warning for insubordination; (2) a June 7, 1997, seven-day suspension for delaying the mail and failure to follow instructions; and (3) an August 7, 1997, fourteen-day suspension for delaying the mail, unauthorized overtime, failure to follow instructions, and failure to perform duties in a satisfactory manner. The proposed removal was upheld by the personnel officer in November 1997.

On appeal to the Board, Ms. Gregory argued that any overestimation should be excused because she was untrained in the practice of estimating route completion times, was unfamiliar with the route she serviced that day, was suffering from carpal tunnel syndrome and bursitis, and had recently had foot surgery. In its

Initial Decision, the Board rejected her arguments, finding Ms. Gregory's factual testimony unpersuasive. *See Gregory*, No. AT0752980261-I-1, slip op. at 11-12. Instead, the Board credited the evidence introduced by the Postal Service, especially the testimony of Mr. Cox. *See id.*, slip op. at 12. Accordingly, the Board sustained the charge. *See id.*, slip op. at 13.

The Board also rejected Ms. Gregory's affirmative defenses. These included: (1) allegations that her removal was in part based upon her disabled status (as we noted above, Ms. Gregory suffered from carpal tunnel syndrome, bursitis, and had recently had foot surgery); (2) claims that her removal was based in part upon race, sex, and age discrimination; and (3) claims that her removal was in retaliation for filing EEO and OSHA complaints and for engaging in union activities. The Board found that Ms. Gregory had not produced sufficient facts to substantiate her claims that the disciplinary action was taken against her for any of these reasons. *See id.*, slip op. at 13-17.

Finally, the Board sustained the removal penalty—finding that the Postal Service had properly applied the factors announced in *Douglas* v. *Veterans Admin.*, 5 MSPB 313, 5 M.S.P.R. 280, 306 (1981). In doing so, the Board's analysis rested heavily upon Ms. Gregory's prior disciplinary record, stating that "it revealed a pattern of conduct by [Gregory] to disregard the agency's and her supervisor's expectations of her performance and conduct." *See Gregory*, No. AT0752980261-I-1, slip op. at 19. Because of this "pattern," the Board ruled that the agency had chosen a penalty within the bounds of reasonableness and affirmed the removal. *See id.*, slip op. at 20.

The initial decision became final on October 20, 1999, *see Gregory* v. *United States Postal Serv.*, 84 M.S.P.R. 619 (1999) (Final Order), precipitating Ms. Gregory's petition to this court. *See* 5 U.S.C. § 7703 (1994). We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(9) (1994).

II

In this court, Ms. Gregory challenges the factual findings that underlie the Board's holding sustaining the charge against her and rejecting her affirmative defenses. Our review of these factual considerations is extremely limited. *See Rosete* v. *Office of Personnel Mgmt.*, 48 F.3d 514, 516 (Fed. Cir. 1995). We must affirm the Board's decision unless we find it to be: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) in violation of required procedures; or (3) unsupported by substantial evidence. *See* 5 U.S.C. § 7703(c) (1994).

Here, we cannot say that the Board's factual findings are unsupported by substantial evidence. The Board evaluated the evidence presented by both Ms. Gregory and the Postal Service, finding the latter more credible and persuasive. Such evaluations, when based on the testimony of witnesses, are "virtually unreviewable" by this court. *King* v. *Department of Health & Human Servs.*, 133 F.3d 1450, 1453 (Fed. Cir. 1998). The Board found that Ms. Gregory had indeed overestimated the amount of overtime or assistance she required, and that Ms. Gregory's arguments relating to her lack of qualifications for making such a determination were "without merit," given Ms. Gregory's position and experience with the Postal Service. The Board further found that Ms. Gregory had failed to produce evidence sufficient to

make a prima facie case of discrimination or retaliation in her defense—the Board concluded that no evidence was introduced that indicated that the disciplinary action was not the result of her job performance, and that, in addition, no evidence was introduced that would show that discrimination or retaliation played any role in the evaluation of Ms. Gregory's performance or penalty. We have reviewed the record produced by the Board and find that the Board's factual findings are supported by substantial evidence. Accordingly, we affirm the Board's decision on the charge and its rejection of Ms. Gregory's affirmative defenses.

III

Ms. Gregory also argues that the Board erred when it rested its analysis of the reasonableness of the penalty upon her three prior disciplinary actions, at least some of which were then the subject of grievance proceedings. We agree.

Both the Board and the Postal Service considered, as part of their analysis, three prior disciplinary actions taken against Ms. Gregory: (1) the May 1997 Letter of Warning, (2) the June 1997 seven-day suspension, and (3) the August 1997 fourteen-day suspension. It is undisputed that at least some of these prior actions were the subject of grievance proceedings during the time that this case was pending before the Postal Service and the Board. Indeed, we have taken judicial notice of the fact that one of the actions—the May 1997 Letter of Warning—was overturned by an arbitrator in July 1999 and ordered expunged from Ms. Gregory's personnel record. Our review of the record does not indicate the status of the challenges to the remaining disciplinary actions used to support the removal of Ms.

Gregory, though we note again that the Postal Service does not dispute that duly-raised challenges to these actions were pending during the time that this dispute was being considered by the Postal Service and the Board.

The Board made clear that its determination that the penalty of removal was reasonable under these circumstances was based largely on the prior disciplinary history put forward by the Postal Service. Indeed, the Board noted that "a removal for one instance for failure to perform duties satisfactorily may appear unreasonable." *Gregory*, No. AT0752980261-I-1, slip op. at 19. However, the Board stated that the prior disciplinary history "reveals a pattern of conduct" that made the penalty of removal reasonable. *Id.*

There is no doubt that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given circumstances. *See, e.g., Bryant* v. *National Science Found.*, 105 F.3d 1414, 1417 (Fed. Cir. 1997) (sustaining penalty in part based upon prior disciplinary record); *Webster* v. *Department of the Army*, 911 F.2d 679, 684-85 (Fed. Cir. 1990) (same); *Davis* v. *Veterans Admin.*, 792 F.2d 1111, 1113 (Fed. Cir. 1986) (same); *Douglas* v. *Veterans Admin.*, 5 MSPB 313, 5 M.S.P.R. 280, 306 (1981) (prior disciplinary actions relevant when assessing penalty). But there can also be no doubt that a penalty determination cannot be supported by an earlier prior disciplinary action that is subsequently reversed. *See Jones* v. *Department of the Air Force*, 24 M.S.P.R. 429, 431 (1984) ("Since [employee's] earlier ten-day suspension . . . was reversed by grievance, it was effectively canceled and thus should not be considered in determining a reasonable penalty for the current charge."). In this case, Ms. Gregory had challenged, via grievance proceedings, at least part of the prior disciplinary history that was relied upon by the Postal Service and Board in determining the reasonableness of the penalty. At the time of the Board decision, at least, it appears that these challenges were pending. If the grievances were sustained and the prior actions ordered expunged—as, indeed, happened in at least one instance in this very case—the foundation of the Board's Douglas analysis would be compromised. Accordingly, we hold that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits. To conclude otherwise would risk harming the legitimacy of the reasonable penalty analysis, by allowing the use of unreliable evidence (the ongoing prior disciplinary actions) to support an agency action.

Here, as we noted above, the Board (and, it appears, the Postal Service[1]) used Ms. Gregory's prior disciplinary history as a primary factor in determining the reasonableness of the penalty. Because those prior actions that were the subject of ongoing grievance proceedings could not be used, the Board abused its discretion in relying upon them. Accordingly, the Board's determination that the penalty of removal was reasonable must be set aside.

Upon remand, we leave it to the Board to determine whether: (a) the case should be immediately returned to the Postal Service to select a penalty in light of the

[1] Both Ms. Gregory's immediate superior and the personnel officer explicitly noted that Ms. Gregory's prior disciplinary record was a significant basis for their decision to remove her.

precise status of Ms. Gregory's prior disciplinary record; or, (b) the Board should retain jurisdiction for the purpose of exercising its own mitigation authority pursuant to the framework established by *LaChance* v. *Devall*, 178 F.3d 1246, 1259-60 (Fed. Cir. 1999).

IV

The Board's determination regarding the charge against Ms. Gregory—that she failed to perform her duties satisfactorily by overestimating the amount of time that it would take her to complete her mail route—is supported by substantial evidence. The Board's conclusion that the removal penalty was reasonable under the circumstances was an abuse of discretion and is vacated. The case is returned to the Board for further proceedings not inconsistent with this opinion.

COSTS

No costs.

AFFIRMED-IN-PART, VACATED-IN-PART AND REMANDED

APPENDIX B

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Docket Number AT-0752-98-0261-I-1

MARIA A. GREGORY, APPELLANT

v.

UNITED STATES POSTAL SERVICE, AGENCY

[Filed: Oct. 20, 1999]

FINAL ORDER

Before: ERDREICH, Chairman, SLAVET, Vice Chair, MARSHALL, Member

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable,

evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Board's final decision in this matter. 5 C.F.R § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request further review of this final decision.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review this final decision on your discrimination claims. *See* Title 5 of the United States Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). You must send your request to EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P.O. Box 19848
Washington, DC 20036

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion , sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e-5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you do not want to request review of this final decision concerning your discrimination claims, but you do want to request review of the Board's decision without regard to your discrimination claims, you may request the Untied States Court of Appeals for the Federal Circuit to review this final decision on the other issues in your appeal. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat* v. *Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in 5 U.S.C. § 7703. You may read this law as well as review other related material at our web site, *www.mspb.gov*.

FOR THE BOARD: Signature illegible

Robert E. Taylor
Clerk of the Board

Washington, D.C.

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE

Docket No. AT-0752-98-0261-I-1

MARIA A. GREGORY, APPELLANT

v.

UNITED STATES POSTAL SERVICE, AGENCY

[Filed: Sept. 11, 1998]

INITIAL DECISION

Before: YOVINO, Administrative Judge

On December 23, 1997, the appellant filed an appeal of her removal from the position of Letter Technician, PS-6, with the U.S. Postal Service in Hinesville, Georgia, effective November 26, 1997.

The Board has jurisdiction over this appeal. *See* 5 U.S.C. §§ 7511(a)(1)(B), 7512(1), and 7701. The hearing requested by the appellant was held in Savannah, Georgia, on March 31, and April 1, 1998. For the reasons below, the agency's action is AFFIRMED.[1]

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[1] After the close of record, the appellant filed a Supplemental Brief. *See* Appeal File, Tab 24. Because that brief was filed after the close of record and is not a reply brief to the agency's closing argument, I have not considered it.

BURDEN OF PROOF

The agency must prove: (1) its charge by preponderant evidence, 5 U.S.C. § 7701(c)(1)(B); (2) the existence of a nexus between the sustained charge and the efficiency of the service, 5 U.S.C. § 7513(a); and (3) the reasonableness of its penalty, *Douglas* v. *Veterans Administration*, 5 M.S.P.R. 280, 307-308 (1981).

The appellant has the burden of proving, by preponderant evidence, her affirmative defenses of disability, race, sex, and age discrimination and retaliation for filing Equal Employment Opportunity (EEO) complaints, Occupational Safety & Health Administration (OSHA) complaints, and union activity.[2] *See* 5 C.F.R. § 1201.56(a)(2)(iii); Appeal File, Tab 14.

ANALYSIS AND FINDINGS

1. The merits

The appellant was removed based on a charge of failure to perform her duties in a satisfactory manner. *See* Agency Response, Tab 4b. The specification of the charge involves an allegation that the appellant overestimated her need for overtime/auxiliary assistance on September 13, 1997. It is undisputed that the appellant carried the mail on City Route 04 (CR4) on September 10 through 13, 1997. On September 13, 1997, while assigned to case and carry that route, she requested 3.5 hours of overtime/auxiliary assistance. The disputed

[2] The appellant's allegation of harmful procedural error was rejected prior to the hearing for failure to clarify her allegations after the prehearing conference. *See* Appeal File, Tab 16.

factual issue on the merits of the charge concerns whether the appellant overestimated her time by the 1.5 hours with which she was charged.

To understand the factual basis for the agency's charge, it is important to understand the duties of the appellant's position. Five mail delivery routes may be configured in a swing route and the mail for those routes is delivered by five letter carriers and a Letter Technician (T-6), who replaces one of the regular carriers on a different day of the week or when that carrier is absent. This system allows for each of the six employees to have a scheduled day off and still have the five routes covered each day.

Therefore, the T-6's job is more in-depth than that of a regular carrier. *Id.* at 34. He/she must be familiar with five routes and perform the duties of a letter carrier (casing and delivering mail) when the regular carrier is off work. The T-6 has other responsibilities, including training new carriers, reporting observations of problems on the routes, and providing assistance on other routes as needed. As a result, the T-6 is paid a higher salary than the regular letter carrier. The appellant worked as a letter carrier and a T-6 for almost all of the twelve years she worked for the U.S. Postal Service. Transcript (Tr.) at 463.

J. T. Adams, President of Local Branch 53 in Jacksonville, Florida, testified generally about the duties and responsibilities of a letter carrier and T-6, but he testified that he was not familiar with the route at issue in this appeal—CR4. He testified that, when the appellant first arrives at work, there is mail waiting for her to prepare for delivery. The appellant's first responsibility is to separate the mail for delivery at her case,

which was described as similar to a table with a hutch on the back of it. Tr. at 20. That hutch contains horizontal shelves with dividers to allow for the separation of the mail. *Id.* The dividers have address labels (referred to as case labels) on them, and the carrier must use memory recall to determine whether the postal customer has moved or placed his/her mail on hold. *Id.* at 20-21.

Clerks leave mail for the carriers at their case and that mail is generally labeled in trays identifying the route to which the mail goes. *Id.* at 23. The carriers then take a hand full of mail, and, piece by piece, place it in the designated slot. *Id.*

After the mail is cased, the carrier pulls the mail and prepares to go on the street to deliver it. At that point, the carrier withdraws the Delivery Point Sequence (DPS) mail for her route, *i.e.*, mail that has been separated by computer for delivery. She loads the postal vehicle with her cased mail, her DPS mail, and her accountable mail (mail requiring signature or collection of money), proceeds to her route, and delivers the mail. She then returns to the post office.

By 9:30 a.m. each morning, the carrier is required to turn in Postal Form 3996, entitled "Carrier-Auxiliary Control" if he/she believes that he/she will need additional assistance to accomplish mail delivery. By completing that form, the carrier is requesting additional assistance either through the approval of overtime or assistance from other carriers. It is undisputed that the carriers are held to being able to estimate their time within 15-20 minutes of the actual time expended.

On September 13, 1997, the appellant completed a 3996 requesting 3.5 hours of overtime/auxiliary assistance to deliver the mail on CR4. *See* Appeal File, Tab 7, Exhibit 1. In Block J of that form, the appellant was required to write the reason for her use of auxiliary assistance and she wrote: "1/2 K-Marts," "Heavy mail volume," "Heavy accountables," and, "Heavy parcels." *Id.* She also added "new case labels." *Id.*

The appellant's supervisor, William J. Cox, Supervisor of Customer Service in Hinesville, Georgia, testified that, on September 13, 1997, the appellant's cased volume was only 9.25 linear feet (not including DPS mail) and that her estimate of 3.5 hours of overtime/auxiliary assistance seemed like a gross overestimate to him for such a low volume of mail. Tr. at 100. Mr. Cox testified that, whenever anyone put in a request for more than 2 hours, it sends up a red flag. *Id.* He testified that, on September 13, 1997, the mail volume was so light that the carriers only put in two 3996s all day. *Id.* at 102. He also testified that, except around a holiday, he did not recall anyone requesting overtime in the amount of 3.5 hours. Tr. at 140. Thus, based upon his knowledge of her mail volume on that day, he questioned whether she had grossly overestimated her need for assistance.

Mr. Cox testified that she turned in the 3996 before she finished casing her mail. After she finished casing her mail, he observed the mail that she had and questioned her whether delivery of the mail would take the time she estimated. Tr. at 100-101. The appellant responded to him that it was an estimate. *Id.* at 101. He then decided to hand off some of her mail to other carriers and to accompany her when she delivered the remaining portion of her route.

Mr. Cox pulled off that portion of the mail the appellant had that he estimated would take about 3 hours to deliver. That mail was counted by Shawn A. Thompson, Supervisor of Customer Service at Hinesville, Georgia. It was then assigned to three different carriers who did not have 8 hours of work to complete due to low volume: James Poppell, Shannon Aldridge, and "KC."

The appellant and Mr. Cox then went out to the postal vehicle she had previously loaded with her mail and separated out the portion that she was going to deliver. *Id.* at 104. They switched delivery vehicles because they needed a vehicle that had an extra seat on which he could sit. *Id.* at 104-05. It took the appellant 3 hours to deliver her route, which she completed at 3:00 p.m. She drove back to the post office and unloaded her vehicle, which took 22 minutes. Thus, she returned to the post office at 3:22 and was thereafter sent out to assist on another route. *Id.* at 105. She left work at the end of her regular tour of duty, which was at 4:30 p.m.

According to Mr. Cox's testimony, he testified generally that he observed nothing unusual concerning the appellant's delivery of mail on CR4. That route is not a walking route; the carrier pulls up to the boxes and delivers the mail. That route has over 1,000 stops and cluster boxes. Tr. at 202. A cluster box, for example, contains the mail receptacles at an apartment building and services several postal customers. The front of the box is where postal customers retrieve their mail by using their individual keys. The back of the box can be opened by the carrier with one key, giving her access to all boxes at once for the delivery of mail.

Mr. Cox testified that a carrier has to walk approximately 10 to 15 feet to a cluster box. There are two parking loops on CR4, which require the carrier to walk approximately 1/4 mile to deliver the mail for the whole loop. *Id.* at 110.

Mr. Cox testified that he accompanied the appellant each time she walked up to a cluster box to deliver mail. Tr. at 116. He testified that some of the boxes had some mail left from the day before, but that none were too full to the point that she could not easily place mail in the boxes. *Id.* In fact, he testified that he remembered that one box had five small cards in it. *Id.* He testified that she did not pull mail out of cluster boxes to bring it back to the post office. *Id.* at 106.

He testified that he does not recall if she were [*sic*] wearing a brace on her arm, but he does recall that, while she had previously been on light duty, she was not on light duty or restricted duty that week. *Id.* at 106-07. And, she did not indicate or act like she was feeling less than normal concerning her physical health. *Id.* at 107-08. And, he did not observe her having any difficulty walking to and from her postal vehicle on September 13. *Id.* at 118-19.

The appellant had a myriad of explanations as to how she estimated that she would need 3.5 hours of additional assistance. Although she testified that she did not know how to calculate the amount of additional assistance she would need because she was not trained in that regard, she also testified that she not only felt that she had properly estimated her time, but that she may have shorted herself from the time she would have needed to deliver the route. Tr. at 556-57.

In fact, the appellant testified that she considered many, many factors, in her deliberations, which would lead one to conclude that she had a reasoned basis for her estimate. She testified that she considered such factors as: (1) she was unfamiliar with the route; (2) she would have to "clean up" mail she brought back to the post office; (3) she estimated her DPS mail based on the average of 1000 pieces, but she only had 871 pieces on September 13; (4) she received an additional 1.5 feet of mail after she turned in the 3996; (5) having considered that she would pull mail out of customers' boxes regardless of the fact that she was told not to do so by Mr. Cox; (6) her having to prepare and carry mail that was curtailed from the day before; (7) she had approximately 20 linear feet of mail to deliver; (8) having the case labels changed so that it would slow her down while she re-learned where the addresses were located on the case; (9) her impaired ability to walk because of her foot surgery and to case and carry mail because of her carpel tunnel syndrome and bursitis; (10) the effects of having to deliver mail during the day and of the sunlight hitting the pavement and after dark and the presence of nightfall impairing her ability to see; (11) auxiliary assistance does not have to service the route because they deliver the mail regardless of whether the postal customer has moved or has mail on hold; and (12) she thought she would be leaving to deliver the mail 45 minutes to 1 hour later than she actually left because Mr. Cox told her not to pull the mail for the hold mail at the post office, but to do it on the street.

I found the appellant's explanation that she was not trained in the art of estimating to be without merit. First, clearly, even at the hearing, she believed that she had properly estimated, if not shorted herself with, the

time she would need to deliver the mail she had on September 13, 1997. And, she provided detailed testimony as to the many variables she claims she thoughtfully considered in arriving at her estimate for auxiliary assistance for that day. Both her belief in the correctness of her estimate and her detailed thought process is inconsistent with her claim that a lack of training was responsible for any overestimate on her part.

As one of the T-6s, the appellant was paid more and was expected to be able to handle more than the regular letter carriers. She had been performing that job for several years. In fact, Mr. Cox testified that she delivered the mail on CR4 faster than the regular carrier. Tr. at 138. And, it is undisputed that the carriers are held to being able to estimate their time to within 15 to 20 minutes. Despite her disciplinary action in August 1997 for unauthorized use of overtime, there is no evidence that she requested training specifically on how to complete a 3996 or otherwise asserted that she did not know how to perform that function. In fact, Mr. Cox testified that she never indicated that she lacked the skills to estimate properly or that she was otherwise not qualified to perform the duties of a T-6, Tr. at 109, 112-13.

Moreover, I found the appellant's explanations as to the matters she considered in arriving at her estimate lacked merit. As for her claim that she was unfamiliar with the route, she testified that she had carried CR4 for a total of about fifteen times and for three days immediately preceding September 13, 1997. Thus, she had, in my view, a reasonable amount of time in which to familiarize herself with the route. And, I note that

she did not raise this in her defense in response to the notice of proposed removal.

As it turned out, Mr. Cox's ability to estimate the amount of time required to deliver mail was very telling, in my view, particularly since he had not delivered, and was not responsible for delivering, the mail on CR4. Carrier Poppell assisted CR 4 for .18 (hundredths of an hour), Aldridge assisted for 1.42 (hundredths), and KC assisted for 1.25 (hundredths). *See* Exhibit E. *See* Tr. at 102-03. Thus, those three carriers delivered the mail Mr. Cox pulled off from the appellant in 2.85 (hundredths) hours, making his estimate for three hours of work short by only .15 hundredths of an hour.

I also find it difficult to believe that she considered that she would need time to "clean up" or process the mail that she brought back to the post office. She, herself, testified that, when working overtime, the carrier is not allowed to clean up that mail. That mail must be processed the next day. Tr. at 499.

As for the appellant's claim that she assumed that there wold be more DPS than there was on September 13, she assumed that she would have 1000 pieces of DPS mail to deliver, but she only had 871 pieces. Tr. at 559. She estimated that it would have taken her about 20 minutes longer if she had the additional 129 pieces of mail. *Id.* However, Mr. Cox testified, without rebuttal, that, in filling out the 3996, every carrier is supposed to look at the volume report for DPS mail that is posted on the wall. Tr. at 169-70. He also testified that it would take only a couple of minutes more to deliver 1000, as opposed to 871, pieces of DPS mail since the mail was already in order to be delivered. *Id.* at 170-71.

It is not clear to me how the fact that the appellant may have received additional mail to case and/or deliver after she turned in the 3996 was a favorable consideration to the appellant. Since she allegedly received it after she estimated the amount of auxiliary assistance she would need when she turned in the 3996, any such additional mail could not have been a relevant factor in the appellant's act of estimating. If anything, the appellant's receipt of any such additional mail would tend to show that she had overestimated her need for auxiliary assistance by even more than that with which she was charged.

The appellant's argument that her estimate was inflated, in part, because she considered that she would pull mail out of customers' boxes even though she was specifically told not to do so by Mr. Cox[3] is unpersuasive. Since Mr. Cox told her not to pull any such mail, the appellant should not have assigned any additional time for this task when calculating the need for assistance. And, by the appellant's own account, she would bring such mail back to the post office little by little so as not to have Mr. Cox detect that she continued to disobey his instructions. Tr. at 537-40. The appellant had been delivering that route for three days before September 13. She did not explain how, under the circumstances, that much mail would have accumulated in so many boxes on her route in four days such that it would add additional time for her to deliver the mail. Finally, Mr. Cox testified that he did not see any boxes

[3] I note that, in the notice of 14-day suspension dated August 7, 1997, Mr. Cox specifically informed the appellant that she "cleaned out cluster boxes which [he] told [her] was the responsibility of the regular carrier and not the T-6. . . ." *See* Appeal File, Tab 12, Exhibit 9, pp. 6-7.

that were stuffed with mail; he specifically recalled one box having five pieces of mail in it.

There is no evidence that the fact that the appellant had mail curtailed from the day before (K-Mart circulars and parcels) was a factor that helped to justify her overestimate of assistance required. The volume of previously-curtailed mail was taken into account by Mr. Cox in his estimate and assignment of assistance to the appellant. And, the mail was delivered by the appellant and the other carriers in far less time than the appellant estimated she would need.

In addition, the appellant argued that she had a very heavy volume of mail—20 linear feet of mail—to deliver. The records show that she had 17 feet of delivered volume (including 9.5 feet of cased mail), but she testified that she had approximately 20 feet of mail.[4] Tr. at 508.

In my view, it is not necessary to determine the exact amount of the mail that the appellant had to deliver that day. For, the fact of the matter is that Mr. Cox, considering the same amount of mail, was able to pull

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[4] On September 4, 1997, the appellant requested 4.25 hours of auxiliary assistance because of high volume following a holiday—22.25 feet of mail (without DPS mail). *See* Exhibit A-1. Mr. Cox testified that he approved 3 hours of overtime and that the appellant had a great deal of justification in making her estimate—a total of 30 feet of mail to deliver. Tr. at 141-43. And, he testified that he cannot say that the appellant overestimated her time on September 4 because he did not know if he curtailed some mail that day. *Id.* 141-44. In any event, the appellant testified that, in making her estimate of the need for assistance on September 13, she did not consider the amount of mail she had to deliver on September 4. *Id.* at 511.

off almost exactly 3 hours of mail to distribute to other carriers to deliver and have them accomplish the delivery of that mail. In addition, the appellant was able to deliver the remaining mail in far less time than her estimate.

The appellant's testimony was undisputed that the address labels on her case were changed on September 13. She testified that she considered that, as a result, it would take her more time to case the mail that day and she would, therefore, need that much more help to complete her route. However, the appellant did not explain how this consideration justified her estimate on that day. Again, even with the case labels being changed, delivery of the mail on CR4 was accomplished in far less time than the appellant estimated she would need.

I find it particularly revealing that the appellant did not list on the 3996 on September 13 her alleged impaired ability to walk or to case and carry the mail due to her foot surgery, carpal tunnel and bursitis. For, on September 8, 1997, she listed that one reason she needed auxiliary assistance that day was because her hand hurt. *See* Exhibit A-2. Thus, she clearly knew she could list her medical condition, if it impacted her ability to deliver her route, as a basis for justifying her need for auxiliary assistance. And, in her affidavit dated September 25, 1997, in response to the notice of proposed removal, the appellant stated that she was wearing her carpal tunnel brace, but she did not mention any difficulty regarding her foot. *See* Appeal File, Tab 1. I also note that Mr. Cox testified that he did not recall if she were [*sic*] wearing a brace on her arm on September 13. Tr. at 106.

The appellant had surgery on her right foot in May 1997 to remove a neuroma and she was then on sick leave for about 2.5 months. Tr. at 464. She returned to work on light duty in mid-July 1997, with a restriction of not walking more than 50 feet and carrying no more than 20 pounds. *Id.* at 465-66. She continued on light-duty status until the end of August 1997, receiving auxiliary assistance to deliver her routes.

However, she had been released to full duty beginning in September. And, I note that Mr. Cox testified that the appellant did not indicate she was in less than full health and did not act as if she were having any difficulties. Tr. at 107. Specifically, he testified that she was having no difficulty walking to and from the postal vehicle on September 13. Tr. at 118-19. And, he testified that there was not a great deal of walking on the appellant's route.

The humidity and reflection from hot weather during daylight hours are factors that might affect every carrier and the appellant presented no evidence that she, in particular, would be affected by such conditions. And, the appellant's testimony that it started to get dark at about 6:00 p.m. on September 13 is not credible. Actually, on September 13, 1997, the sun did not set until 7:34 p.m. in Savannah, Georgia. *See* The Old Farmer's Almanac, *www.almanac.com.* If the appellant had been granted the amount of overtime she requested, she would have concluded at 8:00, including her travel back to the post office and unloading the vehicle. Thus, even assuming that the sky becomes dark exactly at sunset, she would only have had a few minutes of mail left to deliver based upon her estimate.

As for the appellant's statement that auxiliary assistance does not have to service the route because they deliver the mail regardless of whether the postal customer has moved or has mail on hold, the appellant did not explain how much additional time it would have taken to deliver the route if the mail had been serviced for people moving or placing their mail on hold. In addition, there is no evidence that, on September 13, there was a great deal of mail on hold or to be forwarded. And, as noted below, I find that the appellant was allowed to pull the hold mail at her case—at least the mail that was triggered by memory recall. Thus, I find that the appellant did not show that this factor accounted in any significant way for the discrepancy between her estimate and the actual time it took to deliver the mail on September 13.

The appellant's testimony that she considered that she would be leaving the post office 45 minutes to one hour sooner than she did on September 13 is also of no moment. The reason, she testified, that she miscalculated her leaving time was because Mr. Cox prevented her from completing the withdrawal of her hold mail and told her to perform that function on the street. Tr. at 546-48. Mr. Cox testified that the appellant verified her hold mail and change of address at her case on that day. Tr. at 117.

I find that Mr. Cox's testimony was more credible than the appellant's. He clearly had no "ax to grind" with the appellant. In fact, the appellant testified that when he rode with her on September 13, they discussed various matters of a personal nature, such as family matters, hobbies, and his car. Tr. at 567-68. Thus, it appears that they had a rather pleasant, friendly conver-

sation, during which they joked and the appellant expressed concern for his safety. *Id.* at 568.

Mr. Cox's testimony was straightforward and not dissembling. He had a vivid recollection of the events of September 13, and I can discern no reason for him to fabricate his testimony in this regard. It also does not make sense that he would tell her not to pull the hold mail after he had made the decision to pull off some of her mail for other carriers to deliver. And, the appellant, at various times throughout the hearing, vacillated in her testimony and focused on minutia that could not have been responsible for her estimate. Accordingly, I find that Mr. Cox did not prevent the appellant from performing her duties regarding hold mail at the case on September 13.

Mr. Cox also acknowledged that she did stop her postal vehicle to retrieve a first-class letter in the middle of the road on the military base. Tr. at 135-37. He testified that he did not believe that it was her responsibility to police the base and that he considered this act, and the fact that she seemed to be rearranging packages in her vehicle, to be a waste of time. Tr. at 132, 136-37. He also acknowledged that she brought back to the post office some DPS mail that could not be delivered, but that he did not recall how much mail was involved. Tr. at 137. Again, because she requested auxiliary assistance, she would not have been authorized to work any mail with which she returned to the post office. And, I also note that the agency did not subtract any time she spent in relocating her mail in the vehicle with two seats.

In her response to the notice of proposed removal, the appellant argued that the total time she spent on

CR4 on September 13 was only .6 of an hour of additional time than she had requested. *See* Appeal File, Tab 1. The appellant's calculations are incorrect. She began her tour of duty at 8:00 a.m. and was supposed to end at 4:30 p.m. According to her estimate of a need for 3.5 additional hours, the time spent on her route should have concluded at 8:00 p.m. (a total of a 11.5 hour day, excluding a half-hour for lunch). By her own accounts, she returned to the post office at 3:22. Taking into account the 2.85 (hundredths) hours (or 2 hours and 51 minutes) spent by the three other carriers, delivery of mail on CR4 could have been completed at 6:13 p.m. (2 hours and 51 minutes after 3:22). Thus, it appears that the appellant overestimated the need for auxiliary assistance by approximately 1 hour and 45 minutes, which exceeds the 15-20 minute allowance by approximately 1.5 hours.

I find, therefore, that the agency proved that the appellant overestimated her need for auxiliary assistance on CR4 on September 13 by 1.5 hours beyond the permissible limits. Part of her duties include the requirement that she estimate the need for auxiliary assistance so that management can decide the best way to accomplish mail delivery by shifting workload or approving overtime. *See* Appeal File, Tab 7, Exhibit 3. Thus, I conclude that the agency proved that the appellant failed to perform her duties in a satisfactorily [*sic*] manner when she overestimated the need for auxiliary assistance on CR4 on September 13. The charge is, therefore, SUSTAINED.

2. The appellant's affirmative defenses

a. Disability discrimination

To establish a prima facie case of disability discrimination based on a failure to accommodate, the appellant must show: (a) that she is a disabled person under 29 C.F.R. § 1614.203(a) and that the action appealed to the Board was based upon her disability; and (b) that she is a qualified disabled person, that is, that she can perform the essential functions of her job with or without reasonable accommodation. *See Savage* v. *Department of the Navy*, 36 M.S.P.R. 148, 151-53 (1988). After the appellant has established a prima facie case, the burden shifts to the agency to demonstrate that reasonable accommodation would impose an undue hardship on its operations. Thereafter, the burden shifts back to the appellant to show that the agency's reasons are a pretext for discrimination.

The appellant contends that she suffers from various medical conditions relating to her foot, bursitis and carpel tunnel syndrome and that her conditions limit her ability to grip, lift and reach up with her right arm. *See* Appeal File, Tab 14. She argued that she could have done her job and estimated her time properly if she were not disabled, *i.e.*, if she had delivered CR4 herself, it would have taken her the amount of time she estimated.

Assuming that the appellant is a qualified disabled person, there is no evidence that her removal was based on her disability. As I found above, there is no evidence that the appellant's medical conditions negatively impaired her ability to deliver the mail on CR4 or that

she would have taken more time if she had delivered the route herself. On September 13, she was no longer on light duty following her foot surgery and she did not identify pain in her hand, arm or foot on the 3996 as a basis for needing additional auxiliary assistance. She was responsible for calculating the estimate at which she arrived and, according to her testimony, she considered many factors not relating to any alleged medical condition. Accordingly, I find that the appellant failed to present a prima facie case that her disability was related to the charge for which she was removed.

b. Race, sex, and age discrimination

The elements of a claim of discrimination on the ground of disparate treatment are: (a) the appellant is a member of a protected group; (b) she was similarly situated to an individual who was not a member of the protected group; and (c) she was treated more harshly or disparately than the individual who was not a member of her protected group.[5] *Buckler* v. *Federal Retirement Thrift Investment Board*, 73 M.S.P.R. 476, 497 (1997). Once the appellant has established a prima facie case, the burden shifts to the agency to articulate a legitimate nondiscriminatory reason for the agency's actions. Finally, once the agency has articulated a legitimate nondiscriminatory reason for its actions, the burden shifts to the appellant to show that the agency's proffered explanation constitutes a pretext for discrimination. To do so, the appellant must establish that the stated reason was false or not the real reason for

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[5] Because the appellant is alleging age discrimination, she must show that her age was the determinative factor in the action she is appealing. *See Borowski* v. *Department of Agriculture*, 40 M.S.P.R. 372, 374 (1989).

the action and that discrimination was the real reason. *Carter* v. *Small Business Administration*, 61 M.S.P.R. 656, 665 (1994).

It is undisputed that the appellant is Hispanic, female, and over 40 years old. The basis for the appellant's claim is that there were other carriers who were not disciplined for overestimating their workload. *See* Appeal File, Tab 14. Specifically, she identified Shannon Aldrich, James Poppell, Casey Chipple, Art Mathadiel, Tammie England, Eddie Johnson and John Weatherbee. *Id.*

During the prehearing conference, the appellant was advised that, for an employee to be a valid comparative employee in a disparate treatment claim, the appellant must prove that the employee engaged in substantially similar misconduct, including having a prior disciplinary record, and were disciplined more harshly. The appellant introduced no evidence whatsoever that any of these employees, except for possibly Eddie Johnson, had a prior disciplinary record. And, there was no evidence that any of those employees overestimated their need for auxiliary assistance. Therefore, I find that the appellant failed to prove her claim that comparative employees (who were not in her protected groups) were treated less harshly.

In addition, Tammie England and Shannon Aldridge are both female and Messrs. Chipple, Johnson and Weatherbee are over 40 years old. *See* Appeal File, Tab 14. Therefore, for these additional reasons, I find that the appellant failed to prove a prima facie case of discrimination based upon age and sex.

c. <u>Retaliation for filing EEO and OSHA complaints and for union activities</u>

To establish a prima facie case of retaliation for filing an EEO complaint, the appellant must show that: (a) she engaged in protected activity; (b) the accused official knew of the protected activity; (c) the adverse employment action under review could, under the circumstances, have been retaliation; and (d) there was a genuine nexus between the retaliation and the adverse employment action. *See Cloonan* v. *United States Postal Service*, 65 M.S.P.R. 1, 4 (1994). To establish a genuine nexus between the protected activity and the adverse employment action, the appellant must prove that the employment action was taken because of the protected activity. *Id.* at n.3. If the appellant meets this burden, the agency must show that it would have taken the action even absent the protected activity. *See Rockwell* v. *Department of Commerce*, 39 M.S.P.R. 217, 222 (1989).

The appellant contends that both Messrs. Cox and Tommy L. Caruthers, deciding official and Senior Labor Relations Specialist for the South Georgia District, Macon, Georgia, retaliated against her for her protected activities of filing-thirty-two EEO complaints concerning discrimination, one OSHA complaint in December 1997 concerning faculty equipment and failure to have a fire plan, and filing grievances on behalf of herself and others. *See* Appeal File, Tab 14.

Mr. Cox testified, without rebuttal, that he was not aware when he issued the notice of proposed removal that the appellant had filed a series of EEO complaints. Tr. at 118-19. He testified that he knew that she had called OSHA into the post office about some hard trays

that were defective, but he also testified, again without rebuttal, that her doing so played no part in his decision to propose her removal. He testified rather adamantly that she was doing what she should have done—report a safety hazard. Tr. at 120. He was also aware that she filed grievances because he discussed them with her at Step 1 in the grievance process.

Mr. Cox's testimony was straightforward and not dissembling. And, I note particularly that, even from the appellant's description of what occurred between her and Mr. Cox while she was delivering her route on September 13, 1997, their conversation was pleasant and personal. I detected no animus toward her in his testimony, other than the fact that he truly believed that she intentionally overestimated her need for auxiliary assistance on September 13, 1997. Accordingly, I find no nexus between retaliation and his decision to propose the appellant's removal.

As for Mr. Caruthers, he testified that he was not aware that the appellant had file an OSHA complaint independently of the instant litigation. Tr. at 235. There was no testimony establishing that he knew that she filed grievances on behalf of herself and others at the time he made his decision to effect her removal. He testified that the appellant may have mentioned during her oral reply that she filed EEO complaints. Tr. at 233. However, there is no evidence that Mr. Caruthers decided to remove the appellant because she filed EEO complaints. In fact, Mr. Caruthers, testified that he read the notice of proposed removal for the first time on the morning of the oral reply. Tr. at 240.

The appellant's evidence of retaliation at the hearing focused for the most part, not on Mr. Cox and Mr.

Caruthers, but primarily on William H. Davis, Postmaster of the Hinesville Post Office and Mr. Cox's supervisor. The undisputed testimony was that Mr. Cox did not discuss with Mr. Davis the fact that he was bringing the instant charge against the appellant. Tr. at 295. Mr. Cox simply sent him the paperwork and Mr. Davis signed the disciplinary request form, concurring in the issuance of the notice of proposed removal. *Id.* There was simply no evidence that Mr. Cox's issuance of the notice of proposed removal was tainted in any way by any influence on the part of Mr. Davis.

Similarly, there was no evidence that Mr. Davis attempted to influence Mr. Caruthers in his decision to effect the appellant's removal. As noted above, Mr. Caruthers testified that he was not familar with the case involving the appellant until the morning of the oral reply. And, he testified that he talked briefly with Mr. Davis after the oral reply and that he did not discuss the matter with him after that brief discussion. Tr. at 240-41 Mr. Caruthers was not asked at the hearing to identify the substance of his conversation with Mr. Davis. Accordingly, there is no evidence that Mr. Davis attempted to influence Mr. Caruthers' decision-making concerning the appellant's removal.

3. Nexus

It is axiomatic that there is a nexus between unsatisfactory performance and the efficiency of the service. *Cf.* 5 U.S.C. § 4302 (employees may be disciplined for performance-related matters). Thus, I find that there is a nexus between the sustained [*sic*] the charge and the efficiency of the service.

4. Reasonableness of the penalty

The Board will review an agency-imposed penalty only to determine if the agency considered all the relevant factors and exercised management discretion within tolerable limits of reasonableness. *Douglas* v. *Veterans Administration*, 5 M.S.P.R. 280, 306 (1981). For the reasons below, I find that the agency conscientiously considered the *Douglas* factors and that the penalty of removal is within the bounds of reasonableness.

Mr. Caruthers testified that he considered the nature of the charge and the fact that there was no room for it to have been a mistake. Tr. at 230. He also considered the fact that the appellant's recent, prior disciplinary actions referenced similar offenses. *Id.*

The appellant's prior record consisted of: (1) a letter of reprimand on May 13, 1997, for insubordination for not following instructions to case her route before leaving work because her child was ill and she needed to obtain a doctor's appointment; (2) a 7-day suspension on June 7, 1997, for delaying mail and failure to follow instructions; and, (3) a 14-day suspension on August 18, 1997, for delaying accountable mail, unauthorized overtime/failure to follow instructions, and failure to perform her duties in a satisfactory manner/unauthorized overtime.[6] *See* Appeal File, Tab 13.

Because those prior disciplinary actions were in writing, made a matter of record, and the appellant had

[6] The first two disciplinary actions were issued as a 7-day and a 14-day suspension, but were subsequently reduced to a letter of reprimand and a 7-day suspension.

the opportunity to grieve them, the Board's review of a prior disciplinary action is limited to determining whether that action is clearly erroneous. *Bolling* v. *Department of the Air Force*, 9 M.S.P.R. 335, 339-40 (1981). Despite having been notified that she could present argument concerning whether the prior actions were clearly erroneous in her closing brief, the appellant's closing brief did not set forth any such arguments. *See* Appeal File, Tabs 14 and 21. I have, nonetheless, reviewed the record of the prior disciplinary actions and I do not find that I am left with a "firm and definite conviction that a mistake has been committed." *Bolling*, 9 M.S.P.R. at 340. Accordingly, I find that the agency properly considered the appellant's prior disciplinary actions.

Mr. Caruthers testified that the appellant did not present any mitigating factors to him during the oral reply. Tr. at 231. Although she mentioned her medical conditions, she did not prove that her removal was taken because of any of those conditions or that they had any impact on the sustained charge. And, while she testified that she was under stress in the post office in September 1997, she produced no evidence to substantiate any such stress or show how stress caused her to overestimate her time. Once an agency has presented a prima facie case of proper penalty, the burden of going forward with evidence of mitigating factors shifts to the appellant. *Kissner* v. *Office of Personnel Management*, 792 F.2d 133, 134-35 (Fed. Cir. 1986).

At first blush, a removal for one instance of failure to perform duties satisfactorily may appear unreasonable. However, considering the appellant's prior disciplinary actions also involved unauthorized overtime, that one

instance takes on additional significance and tends to reveal a pattern of conduct by the appellant to disregard the agency's and her supervisor's expectations of her performance and conduct.

Although the appellant claims that she did not know how to estimate the amount of assistance/overtime she would need, she argued at the hearing that she accurately estimated her time and, indeed, may even have shorted herself. I found the appellant's testimony to be disingenuous. Because Mr. Cox could estimate the amount of time to deliver mail so well and he never even delivered CR4, because it was undisputed that carriers are expected to, and that 99% of the carriers[7] can, estimate the amount of time it will take them to deliver mail, and because the appellant's explanations for how she accounted for her estimate were not credible, I find that the appellant's overestimate was intentional and that she did it to either earn overtime for herself or to avoid delivering some of her mail. *See Hamilton* v. *U.S. Postal Service*, 71 M.S.P.R. 547, 555-56 (1996) (if an agency proves that the employee's misconduct was intentional rather than merely negligent, the agency is free to use that fact as an aggravating factor in the penalty selection).

The appellant occupied a leadership position amongst carriers and was expected to be able to carry out her job. The agency expects carriers and T-6s to properly complete a 3996 so that they can reassign work, as necessary, to accomplish its mission—to deliver the mail as promptly as possible. The agency has to be able

[7] *See* Tr. at 118-19.

to rely upon the honest assessments of their carriers/T-6s to accomplish that mission.

I have considered the testimony of Sheila J. Bolden, who has been the Postmaster in Lafayette, Georgia, since 1991. Prior to 1991, Ms. Bolden supervised the appellant and she testified that the appellant was one of the best employees she ever had. Tr. at 388. She also testified that she would hire her to work in her post office. *Id.* There was no evidence, however, that Ms. Bolden worked with the appellant recently or was otherwise aware of the appellant's past disciplinary record. Accordingly, I find that the testimony of her current supervisor, Mr. Cox, is entitled to greater weight than that of Ms. Bolden.

In my view, that the appellant refuses to accept the instructions she was given by her present supervisors was evident from her own testimony. She testified that Mr. Cox specifically told her not to empty cluster boxes if they were full. Tr. at 534-40. In fact, in the notice of 14-day suspension dated August 7, 1997, Mr. Cox wrote: "After you returned to the office, it was found that you had taken out hold mail again and mail that you had cleaned out of customers boxes which as previously explained was the regular carrier's duty." *See* Appeal File, Tab 13. Nevertheless, she testified that she continues to pull this mail and even disguises the fact that she is doing so in order to avoid detection by Mr. Cox. Tr. at 538-40. I find that this testimony reveals the appellant has little potential for rehabilition.

Based upon these findings and despite the appellant's 12 years of federal service, I find that the agency properly considered the relevant factors and arrived at a penalty that is within the bounds of reasonableness.

Accordingly, I find that the appellant's removal promotes the efficiency of the service.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ LYNN P. YOVINO
LYNN P. YOVINO
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on Oct. 16 1998, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Equal Employment Opportunity Commission (EEOC) or with a federal court. The paragraphs that follow tell you how and when to file with the Board, the EEOC, or the federal courts. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date that initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION REVIEW

If you disagree with the Board's final decision on discrimination, you may obtain further administrative review by filing a petition with the EEOC no later than 30 calendar days after the date this initial decision becomes final. The address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, D.C. 20036

JUDICIAL REVIEW

If you do not want to file a petition with the EEOC, you may ask for judicial review of both discrimination and nondiscrimination issues by filing a civil action. If you are asserting a claim under the Civil Rights Act or under the Rehabilitation Act, you must file your appeal with the appropriate United States district court as provided in 42 U.S.C. § 2000e-5. If you file a civil action with the court, you must name the head of the agency as the defendant. *See* 42 U.S.C. § 2000e-16(c). To be timely, your civil action under the Civil Rights Act, 42 U.S.C. § 2000e-16(c) must be filed no later than 30 calendar days after the date this initial decision becomes final. If you are asserting a claim under the Age Discrimination in Employment Act, your claim must be filed with the appropriate United States district court as provided in 29 U.S.C. § 633a(c). You may have up to 6 years to file such a civil action. *See* 28 U.S.C. § 2401(a).

If you choose not to contest the Board's decision on discrimination, you may ask for judicial review of the nondiscrimination issues by filing a petition with :

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW
Washington, DC 20439

You may not file your petition with the court of appeals before this decision becomes final. To be timely, your petition must be received by the court of appeals no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MARIA A. GREGORY, PETITIONER

v.

UNITED STATES POSTAL SERVICE, RESPONDENT

[Filed: July 13, 2000]

ORDER

Before: MAYER, Chief Judge, CLEVENGER, Circuit Judge, and GAJARSA, Circuit Judge.

A petition for rehearing having been filed by the RESPONDENT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED;

The mandate of the court will issue on July 20, 2000.

FOR THE COURT,

/s/ JAN HORBALY
JAN HORBALY
Clerk

Dated: July 13, 2000

APPENDIX E

STATUTORY PROVISIONS

1. Section 7511(a) of Title 5 of the United States Code states as follows:

§ 7511. Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service—

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Rate Commission; and

(C) an individual in the excepted service (other than a preference eligible)—

(i) who is not serving a probationary or trial period under an initial appointment

pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

2. Section 7512 of Title 5 of the United States Code states as follows:

§ 7512. Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

3. Section 7513 of Title 5 of the United States Code states as follows:

§ 7513. Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence

of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

4. Section 7701 of Title 5 of the United States Code states as follows:

§ 7701. Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority

to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303 or a removal from the Senior Executive Service for failure to be recertified under section 3393a, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant

is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board

fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

5. Section 7703 of Title 5 of the United States Code (1994 & Supp. IV 1998) states as follows:

§ 7703. Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed

under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board,

the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

Supreme Court, U.S.
FILED
JAN 12 2001
OFFICE OF THE CLERK

(2)

No. 00-758

IN THE
Supreme Court of the United States

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

MARIA A. GREGORY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

HENK BRANDS
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Counsel for Respondent

January 12, 2001

30 pp

QUESTION PRESENTED

Whether the Merit Systems Protection Board, in reviewing an agency's disciplinary action against an employee, may rely on a series of prior disciplinary actions when the first in that series has been invalidated in grievance proceedings and when each of the subsequent actions relied on the first and is subject to a pending grievance.

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IN THE

Supreme Court of the United States

No. 00-758

UNITED STATES POSTAL SERVICE,

Petitioner,

v.

MARIA A. GREGORY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION

The United States Postal Service argues that the Federal Circuit erred by embracing a rule prohibiting, in connection with employee discipline pursuant to the Civil Service Reform Act of 1978, reliance on prior disciplinary actions that are the subject of pending grievance proceedings.

Whether the Federal Circuit erred, however, is a question that is not properly before this Court. For one thing, the Postal Service neglected to include its arguments in the brief that it filed in the court of appeals, thereby failing to preserve them for review in this Court. For another thing, on the facts of this case (in which the first of respondent's three prior disciplinary actions was reversed in arbitration and all later disciplinary actions built on that first disciplinary action), the question whether reliance on unarbitrated priors should be permissible is simply not implicated: as the Postal Service

conceded in the court below, the decision of the Merit Systems Protection Board ("MSPB") cannot stand regardless of the answer to that question. And the Postal Service's suggestion that this is the last chance for review is meritless: there is no reason why the Postal Service cannot raise the unarbitrated-priors issue again in a more suitable case.

Even if this case provided a proper vehicle for review, certiorari should still be denied. *First*, the Postal Service's predictions concerning the practical impact of the decision below are vastly overstated. The Federal Circuit's opinion by its terms does not state that agencies may never rely on unresolved priors in imposing disciplinary action — it states only that *the MSPB* may not rely on unresolved priors in sustaining disciplinary action. Moreover, the principle that unarbitrated priors may not be considered in sustaining disciplinary action (which has long been applied by arbitrators) will come into play only in the rare case that reaches the MSPB before all priors have been resolved. *Second*, the Postal Service's claim that the Federal Circuit's rule ignores the presumption of correctness to which final agency action is entitled fundamentally misapprehends the nature of both disciplinary decisions and the grievance process.

Accordingly, the Postal Service's petition for a writ of certiorari should be denied.

STATEMENT

1. In 1985, respondent Maria Gregory accepted a clerical position with the United States Postal Service at the post office in Hinesville, Georgia. *See* MSPB Transcript ("Tr.") 468-69. She became a part-time letter carrier in 1987 and was promoted to full-time regular letter carrier in 1993. *See* Tr. 470. In March 1995, respondent was again promoted to a so-called Letter Technician T-6 — a position above regular letter carrier in which she was responsible for overseeing five

mail routes and delivering the mail when the regularly assigned carriers were unavailable. *See* Pet. App. 15a, 21a, 38a. Respondent simultaneously rose to the rank of shop steward in the local letter carriers' union. *See* Tr. 52. Respondent was known as a model employee. Even the postmaster who ultimately fired respondent acknowledged that, throughout her employ, she had "done a very good job." Tr. 287. A postmaster who had previously supervised her testified that respondent was "one of the best employees she ever had." Pet. App. 39a.

Things changed in 1995. At that time, respondent was sexually harassed by a co-worker. *See* Tr. 474. When respondent complained to her superiors, she found that they were unwilling to do anything more than give the co-worker a slap on the wrist. Indeed, management responded by prohibiting respondent from talking to other letter carriers. *See* Tr. 479-80. Respondent then filed complaints with the Equal Employment Opportunity Commission and other agencies and authorities, which caused relations with her supervisors to become increasingly strained. *See* Tr. 477-81. In later proceedings, there was evidence that, by early 1997, the Hinesville postmaster was looking for ways "to get rid of" respondent, which he viewed as difficult in light of her status as a union steward. *See* Tr. 437-39, 446.

In the spring and summer of 1997, respondent was repeatedly disciplined for minor infractions — even though she had never before been disciplined. *See* Tr. 476. *First*, on April 7, 1997, respondent left work early to take her ill daughter to the doctor. *See* Tr. 486. Although respondent believed that she had received permission to go, her supervisors charged her with insubordination and gave her a letter of warning. *See* Informal Brief and Supplemental Appendix for Respondent United States Postal Service at SA 33a, *Gregory v. United States Postal Service*, No. 00-3123

(Fed. Cir. filed Mar. 17, 2000) ("Postal Service Fed. Cir. Br.").[1] *Second*, on April 18, 1997, some mail that had been misplaced earlier that day turned up in respondent's truck at the end of her route. When respondent reported this to a supervisor, she was told to leave it for delivery by another carrier the next day. Nevertheless, management later charged respondent with intentionally delaying the mail and, relying on the prior letter of warning, suspended her for seven days. *See id.* at SA 33b. And, *third*, respondent was again disciplined for incidents that occurred in July 1997, including allegedly earning overtime without first submitting an overtime-request form (described more fully below). Relying on the prior letter of warning and seven-day suspension, respondent's supervisors suspended her for 14 days. *See id.* at SA 33c-33d.

A fourth and final incident occurred on September 13, 1997. When letter carriers at the beginning of their work day expect that they will need more than the usual eight hours to deliver their route, they are to submit to their supervisor a paper slip (a so-called "Form 3996") requesting either overtime or help from other carriers. *See* Pet. App. 16a; United States Postal Service, *City Delivery Carriers Duties and Responsibilities (Handbook M-41)* at 43-46 (Mar. 1998), *available at* http://www.nalc.org/cau/pdf/manuals/m41.pdf. On the morning of September 13, respondent submitted a Form 3996 that stated that she estimated that, in light of heavy mail volume and other factors, delivering the route that had been assigned to her that day (a route that she had handled only a few times previously, *see*, *e.g.*, Tr. 465-67, 531) would exceed a regular eight-hour work day by three-

[1] This disciplinary action was later vacated by an arbitrator who concluded that respondent was justified in believing that she had permission to leave. *See infra*, p.6.

and-a-half hours. *See* Pet. App. 2a, 17a. Three-and-a-half hours was not substantially more than what respondent had requested (and what her supervisors had approved) on previous occasions. *See*, *e.g.*, Tr. 148-53, 267, 308, 510; Pet. App. 24a n.4.

But respondent's supervisor, William Cox, viewed three-and-a-half hours as being too much. *See* Pet. App. 17a. Cox therefore assigned three hours of work to other carriers and accompanied respondent on the remainder of her route to see for himself why so much time was needed. *See id.* At the end of the day, Cox determined that, taking account of the help from the other carriers, respondent's route had really taken only a little over two hours more than an eight-hour work day. *See id.* at 2a. Thus, Cox determined that, in hindsight, respondent's estimate was off by 1.3 hours, *see id.*, which, in his eyes, was particularly egregious because she had stopped her delivery truck to pick up first-class mail that she had seen lying in the street — something Cox considered a waste of time, *see* Tr. 136-37; Pet. App. 28a.

Although no carrier in Hinesville had previously been disciplined on this ground, *see* Tr. 211-12, 360, Cox concluded that respondent's faulty estimate was cause for severe punishment, *see* Tr. 223-24. Cox reasoned that postal practice was to require letter carriers to be able to estimate their overtime correctly within a 15-minute margin, *see* Tr. 109, 307 — a rule that, oddly, would apparently be violated as much by requesting 45 minutes where 15 minutes suffices as by requesting 3.5 hours where 3 hours suffices. A few days later, Cox sent respondent a notice charging her with failure to perform her duties in a satisfactory manner and proposing that, in light of her three prior disciplines, respondent be fired. *See* Pet. App. 2a. Similarly relying on respondent's previous disciplinary record, a Postal Service Labor Relations Specialist later sustained Cox's proposal. *See*

id. After more than 12 years of dedicated service, respondent had been fired for overestimating by a little over one hour the more than ten hours it took to deliver a route on which she was not the regular carrier.

2. A disciplined postal worker (or her union) may file a grievance pursuant to the applicable collective bargaining agreement. *See* 5 U.S.C. § 7121; *Cornelius v. Nutt*, 472 U.S. 648, 650, 652 (1985). In certain cases (where the employee — like respondent — is a "preference eligible" veteran and where the discipline is serious), the employee also has the option of appealing to the MSPB instead of filing a grievance. *See* 5 U.S.C. § 7513(d); *see also id.* §§ 2108(3), 7121(e)(1), 7511(a)(1); *Royals v. Tisch*, 864 F.2d 1565, 1567 (11th Cir. 1989). Respondent's union filed grievances with respect to each of her first three disciplines, but respondent filed an MSPB appeal with respect to the fourth. The MSPB reviews agency disciplinary actions to ensure that they are "supported by a preponderance of the evidence" and "in accordance with law." 5 U.S.C. § 7701(c)(1)(B) and (2)(C).

After a hearing, an MSPB Administrative Judge rejected respondent's appeal. *See* Pet. App. 13a-43a. Although the Administrative Judge recognized that "a removal for one instance of failure to perform duties satisfactorily may appear unreasonable," *id.* at 37a, the Administrative Judge stated that respondent's prior disciplinary record made termination appropriate, *see id.* at 37a-38a; *see also id.* at 3a, 6a. Respondent then appealed to the full MSPB, but, on October 20, 1999, that body affirmed without opinion. *See id.* at 9a-10a.

On August 28, 1999, a few months before the full MSPB issued its decision (and almost a year after the Administrative Judge's decision), an arbitrator ruled for respondent on the grievance with respect to her first discipline and expunged the letter of warning from her record. *See* Pet. App. 5a.

Respondent, however, was unrepresented by counsel at the time and did not know to bring the arbitrator's decision to the MSPB's attention.

Respondent next appealed to the Federal Circuit, which reviews MSPB decisions for being "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 7703(c)(1). In her *pro se* brief, respondent argued that, because her first discipline (the letter of warning) had been overturned by an arbitrator, her removal was unlawful because "the progression of discipline no longer exists." Informal Brief of Petitioner Maria A. Gregory at [6], *Gregory v. United States Postal Service*, No. 00-3123 (Fed. Cir. filed Feb. 8, 2000); *see id.* at [2] ("no progression exists"). Respondent attached a copy of the arbitrator's award to her brief. *See id.* App. D. Respondent also argued that the MSPB had erred by relying on "prior unarbitrated suspensions." *Id.* at [2]. In its brief, the Postal Service did not respond to the merits of respondent's arguments, arguing only that respondent had waived them by neglecting to raise them before the MSPB. *See* Postal Service Fed. Cir. Br. at 17.[2]

In a unanimous decision, the Federal Circuit held that respondent's removal could not stand. In its opinion, it reasoned that, although "[t]here is no doubt that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given

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[2] As the Postal Service later acknowledged: "On appeal to this Court, Ms. Gregory, appearing *pro se*, provided the Court with a copy of the arbitrator's decision. The Postal Service argued that consideration of this information for the first time on appeal was improper, citing *Sanders v. United States Postal Service*, 801 F.2d 1328, 1331-32 (Fed. Cir. 1986)." Petition for Rehearing of the Court's Opinion Dated May 15, 2000, at 4, *Gregory v. United States Postal Service*, No. 00-3123 (Fed. Cir. filed June 29, 2000) ("Postal Service Rehearing Petition").

circumstances, . . . there can also be no doubt that a penalty determination cannot be supported by an earlier prior disciplinary action that is subsequently reversed." Pet. App. 6a. Taking "judicial notice of the fact that one of the actions — the May 1997 Letter of Warning — was overturned by an arbitrator in July 1999 and ordered expunged from Ms. Gregory's personnel record," *id.* at 5a, the Court stated:

> In this case, Ms. Gregory had challenged, via grievance proceedings, at least part of the prior disciplinary history that was relied upon by the Postal Service and Board in determining the reasonableness of the penalty. At the time of the Board decision, at least, it appears that these challenges were pending. If the grievances were sustained and the prior actions ordered expunged — as, indeed, happened in at least one instance in this very case — the foundation of the Board's [analysis pursuant to *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981),] would be compromised. Accordingly, we hold that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits.

Id. at 7a. Finding that the MSPB had accordingly "abused its discretion," the court of appeals held that "the Board's determination that the penalty of removal was reasonable must be set aside." *Id.*

Represented by numerous high-ranking Department of Justice attorneys who had not previously made an appearance, the Postal Service then filed a petition for rehearing — though not a petition for rehearing en banc. In that petition, the Postal Service challenged (what it termed) "the panel's *apparent* holding that a final agency decision, still pending review, is so inherently unreliable that it may not be considered by the agency or the board in selecting the appropriate penalty for a subsequent adverse action." Postal

Service Rehearing Petition at 5 (emphasis added); *see also id.* at 8 ("apparent holding"); *id.* at 9 ("the Court's decision appears to hold"); *id.* at 11 ("[t]he Court's broad apparent holding"). According to the Postal Service, the Federal Circuit's "apparent holding" ran counter both to the general administrative-law principle that agency decisions must be presumed valid until reversed and to specific MSPB precedent permitting reliance on prior discipline still subject to grievance. *See id.* at 9-14.

Contrary to the position that the Postal Service had taken in its original brief, however, the rehearing petition conceded that the MSPB's decision could not stand. As the rehearing petition put it: "The Postal Service does not contest that portion of the Court's opinion vacating the board's decision and remanding the appeal to the MSPB for further consideration in light of the arbitrator's August 28, 1999 decision. The Postal Service agrees that, on remand, it would be appropriate to exclude the May 13, 1997 suspension letter from consideration in deciding the appropriate penalty." *Id.* at 4-5 n.3. As the petition explained: "Ultimately, the Court is correct that it is appropriate to return this case to the MSPB so that the board may make a determination whether the agency would have taken the same action based upon Ms. Gregory's two remaining disciplinary actions. . . . In making that determination, the board is free to consider argument from Ms. Gregory that the two remaining, previous disciplinary actions also should not be considered." *Id.* at 7 & n.5.

The court of appeals denied the Postal Service's rehearing petition. *See* Pet. App. 44a.

REASONS TO DENY THE WRIT

Because the Federal Circuit has exclusive jurisdiction over appeals from the MSPB, the decision below does not and could not conflict with the decision of any other court of appeals.[3] Although this Court has in rare cases agreed to review Federal Circuit decisions reviewing MSPB decisions,[4] this case is not an appropriate candidate for such treatment. The question whether unarbitrated priors may be considered is not properly presented in this case, and, even if it were, that question would not merit the Court's attention.

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[3] Moreover, the decision below is consistent with a decision of the Second Circuit on review of a district-court decision in a discrimination case. *See Sumner v. United States Postal Service*, 899 F.2d 203, 210 (2d Cir. 1990) ("at least one and possibly two of the six [prior disciplinary actions] should not have been considered, either because they had been expunged from Sumner's employment record or because they were not final").

[4] Saying that "[t]his Court has often recognized that a possible misapplication of the federal civil service laws by the court of appeals is sufficiently important to warrant review," Pet. 7 n.1, the Postal Service implies that this Court routinely accepts MSPB cases for review. In fact, since the Federal Circuit was established in 1982, this Court has done so only four times, and only once in the last 12 years. Moreover, in each of those four instances, there were indicia of certworthiness not present here: one involved an en banc decision (*Cornelius v. Nutt*, 472 U.S. 648 (1985)), one involved a split panel (*Department of Navy v. Egan*, 484 U.S. 518 (1988)), one involved a denial of rehearing en banc in a case in which the Government had appealed from an MSPB decision in the face of Federal Circuit precedent (*LaChance v. Erickson*, 522 U.S. 262 (1998), more fully described *infra*, p.15), and one involved a denial of rehearing en banc resulting in an opinion (*United States v. Fausto*, 484 U.S. 439 (1988)).

I. THE QUESTION WHETHER UNARBITRATED PRIORS MAY BE CONSIDERED IS NOT PROPERLY PRESENTED.

A. There are two reasons why this case is a poor vehicle for addressing the question whether consideration of unarbitrated priors is permissible.

First, the Postal Service failed to preserve the issue below. When respondent argued in her Federal Circuit brief that the MSPB had erred by relying on unarbitrated priors, the Postal Service did not respond by arguing what it so elaborately argues now — that the law *permits* reliance on unarbitrated prior disciplinary actions. *See supra*, p.7. Instead, the Postal Service argued only that respondent had failed properly to raise that issue before the MSPB. *See id.* Although the Postal Service did challenge respondent's argument in its petition for rehearing, the Federal Circuit (like most other circuits) has long held that a losing appellee will not be heard to make legal arguments for the first time in a petition for rehearing. *See Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998) ("we decline to address the government's new theory raised for the first time in its petition for rehearing"). As this Court stated only recently in another case arising from the Federal Circuit, "issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts." *Nelson v. Adams USA, Inc.*, 120 S. Ct. 1579, 1586 (2000).

Second, the question whether reliance on unarbitrated priors is permissible is not implicated on the facts of this case. Of the three prior disciplinary actions that were the subject of pending grievances, the first (to which this brief shall refer as "Case 1") was set aside by an arbitrator. Although the petition is silent on this point, the Postal Service in the court below conceded that, because the MSPB relied on Case 1 in determining the punishment in the instant matter ("Case 4"),

the MSPB's decision cannot stand: the MSPB must make a new decision without relying on Case 1. *See supra*, p.9; *see also Jones v. Department of Air Force*, 24 M.S.P.R. 429, 431 (1984). Indeed, the Postal Service below conceded that, "[i]n making that determination, the board is free to consider argument from Ms. Gregory that the two remaining, previous disciplinary actions ["Cases 2 and 3"] also should not be considered." Postal Service Rehearing Petition at 7 n.5. That was a wise concession. The disciplinary actions in Cases 2 and 3 also relied on Case 1. *See supra*, p.4. Thus, relying on Cases 2 and 3 is tantamount to relying on Case 1.

The outcome in this case therefore does not turn on the question whether the MSPB may consider unarbitrated priors. Whether one applies the Federal Circuit's rule (under which the MSPB may consider neither vacated priors nor priors still subject to grievance) or the Postal Service's proposed rule (under which the MSPB may not consider vacated priors but is free to rely on priors still subject to grievance), the outcome is the same: the MSPB's decision cannot stand, and Cases 1, 2, and 3 may not be considered in determining the punishment in Case 4.[5]

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[5] It might be argued that the debate between the two rules is not entirely academic in that, under the Postal Service's proposed rule, the MSPB may be entitled to rely at least on the findings of infraction in Cases 2 and 3 — even if not on the penalty imposed in those cases. The premise of this argument will likely turn out to be incorrect. As the Postal Service has conceded, respondent on remand will be entitled to relitigate the merits of Cases 2 and 3. *See supra*, p.9. Respondent has never received a hearing on the merits of Cases 2 and 3: the Postal Service had her grievances dismissed as inarbitrable on the theory that, after her removal was upheld by the full MSPB, she was no longer entitled to access to the grievance process. *See infra*, p.19 n.12. Thus, respondent has not yet been "given an opportunity to dispute the action before a higher authority," Pet. 11; *see* Pet. 13, which, under long-standing MSPB precedent, entitles her to *de novo* review of Cases 2 and 3 within the context of Case 4, *see Bolling v. Department of Air Force*, 8 M.S.P.B. 658, 659 (1981).

If it were to grant certiorari, then, the Court would likely find it unnecessary to decide whether the MSPB may ever rely on priors still subject to an unresolved grievance. *See, e.g., Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 275-76 (1992) ("Given what we have said in Parts II and III, our discussion of the issue [on which the Court granted certiorari] would be unnecessary to the resolution of this case."); *Siegert v. Gilley*, 500 U.S. 226, 227 (1991) (declining to reach issue on which Court had granted certiorari because "petitioner's claim failed at an analytically earlier stage of the inquiry"). Indeed, if the Court were to address that question, its decision would to that extent arguably constitute *dictum* and not bind the Court (or even the Federal Circuit) in later cases. *See, e.g., Maryland v. Wilson*, 519 U.S. 408, 412-13 (1997); *Evans Cooling Sys., Inc. v. General Motors Corp.*, 125 F.3d 1448, 1452-53 (Fed. Cir. 1997), *cert. denied*, 522 U.S. 1115 (1998).

In any event, because the punishment in Case 4 was already uncommonly harsh before Case 1 was overturned, *see* Pet. App. 6a, 37a, the removal penalty plainly cannot stand without Case 1. As reflected in this case, the progression of discipline used by the Postal Service appears to be (1) letter of warning, (2) 7-day suspension, (3) 14-day suspension, and (4) removal. A removal for only three minor infractions would thus be excessive. Accordingly, even if it were to consider Cases 2 and 3, the MSPB would no doubt mitigate respondent's punishment to, say, a 14-day suspension. *Cf. Hagmeyer* v. *Department of Treasury*, 757 F.2d 1281, 1285 (Fed. Cir. 1985); *Lopez v. Department of Justice*, 55 M.S.P.R. 644, 646-47 (1992); *Jones*, 24 M.S.P.R. at 431; *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 330-31, 341 (1981); *The Common Law of the Workplace: The Views of Arbitrators* 171-75 (Theodore J. St. Antoine ed., 1998). Thus, Cases 2 and 3 could at most make a difference of two weeks' worth of suspension. Within the context of this case (respondent was removed in 1997), that is a trifle.

B. While this case is thus a poor vehicle for review, the Postal Service in effect suggests that the Court should lower the standards governing certiorari because the question whether the MSPB is entitled to consider unarbitrated priors is unlikely to arise again. This is so, the Postal Service contends, because the MSPB will likely follow the Federal Circuit's rule and because government agencies "d[o] not have an automatic right of appeal from adverse MSPB decisions." Pet. 6-7.

That argument lacks substance. It is true that the Government does not have an appeal to the Federal Circuit as of right: that court has discretionary jurisdiction over government appeals from MSPB decisions similar to this Court's certiorari jurisdiction over court of appeals decisions. *See* 5 U.S.C. § 7703(d); *LaChance v. Devall*, 178 F.3d 1246, 1249 (Fed. Cir. 1999); *see also* 5 U.S.C. § 7701(d)(1); 5 C.F.R. §§ 1201.114, 1201.119. But that will hardly keep the issue from arising again: all the Government needs to do is file a request for review in the Federal Circuit before filing one here.[6]

In fact, there is evidence that the Postal Service is already preparing to do just that. As noted above, the Postal Service's rehearing petition consistently described the decision below as containing only an "apparent holding." *Supra*, pp. 8-9. Evidently, the Postal Service is paving the way for an argument in a later case to the effect that the rule announced below is not binding on other panels — whether on the theory that, because this case involves a *successful* grievance, the language in the Federal Circuit's opinion about *pending* grievances was unnecessary to the decision; on the

[6] Although the Federal Circuit rarely denies the Government's petitions for review, the Government plainly can seek review in this Court if the Federal Circuit does so. *See* 28 U.S.C. § 1254(1).

theory that, given the Postal Service's failure to make its arguments below, future panels of the Federal Circuit are free to disregard the decision; or on some other theory still.[7]

That strategy would hardly be unprecedented. For example, confronted with an adverse Federal Circuit ruling in *Grubka v. Department of Treasury*, 858 F.2d 1570 (Fed. Cir. 1988), the Government did not immediately seek certiorari. Rather, it filed a request for review of another MSPB decision, which the Federal Circuit granted. *See King v. Walsh*, Docket Nos. 95-3593 & 95-3160, 1995 U.S. App. LEXIS 22222 (Fed. Cir. July 27, 1995). In its merits briefs, the Government then argued that the *Grubka* rule constituted *dictum*, both because "the court's reasons as stated in its opinion" were not "essential to the decision in question" and because the issue had not been "fully briefed to the court." *King v. Erickson*, 89 F.3d 1575, 1582 (Fed. Cir. 1996). Only after the Federal Circuit rejected those arguments did the Government seek review in this Court. *See LaChance v. Erickson*, 522 U.S. 262 (1998).

No reason comes to mind why the Postal Service should not be required to follow the same path here. So long as the Postal Service still has available to it in the Federal Circuit an avenue that may accomplish its objectives, there simply is no pressing reason to consume the scarce resources of this Court. There will be time enough to entertain the Postal Service's arguments if and when that avenue proves unrewarding.

[7] *See, e.g., Bennis v. Michigan*, 516 U.S. 442, 450 (1996) ("[I]t is to the holdings of our cases, rather than their dicta, that we must attend.") (internal quotation marks omitted); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995) (where point was "uncontested by the parties" in a prior case, statements did "not bind" the Court).

II. EVEN IF THE QUESTION WHETHER UNARBITRATED PRIORS MAY BE CONSIDERED WERE PROPERLY PRESENTED, IT WOULD NOT MERIT REVIEW.

According to the Postal Service, this Court's intervention is warranted because the decision below will make reliance on prior disciplinary actions practically impossible not only for the MSPB but also for all government agencies whose personnel decisions are reviewed by the MSPB. The Postal Service argues that grievances usually take years to resolve, and that the Federal Circuit's rule thus in effect allows employees to insulate prior disciplinary actions from all consideration simply by filing a (possibly frivolous) grievance. *See* Pet. 6, 16-18. And on the merits, the Postal Service argues, the Federal Circuit's rule ignores the presumption of correctness to which final agency action is entitled. *See* Pet. 6, 11-12. Each of these arguments, however, lacks merit.

A. The Postal Service's predictions concerning the practical impact of the decision below (Pet. 14-18) are greatly exaggerated. Contrary to the Postal Service's suggestion, *see* Pet. 6, 15-17, the terms of the Federal Circuit's opinion do not state that agencies may never rely on unresolved priors in imposing disciplinary action; the court of appeals' opinion states only that *the MSPB* may not rely on unresolved priors in sustaining disciplinary action.[8] The opinion does not state that the Federal Circuit would fault the MSPB for sustaining an agency's disciplinary action in reliance on priors that,

[8] *See* Pet. App. 7a ("At the time of the Board decision, at least, it appears that these challenges were pending."); *id.* ("If the grievances were sustained . . . the foundation of the Board's *Douglas* analysis would be compromised."); *id.* ("[T]he Board abused its discretion in relying upon them.").

although still subject to grievance when the agency acted, had become final by the time the MSPB decided. The Federal Circuit's rule can thus be viewed as nothing more than a principle governing the scheduling of appeals: the MSPB should not decide a case until relevant priors have been arbitrated.[9]

And even that rule — which, contrary to the Postal Service's argument (*see* Pet. 9-14), is entirely consistent with the MSPB's *Douglas/Bolling/Jones* jurisprudence — will likely not come into play in many cases. It is a matter of simple logic that, in the normal course, challenges to prior disciplinary actions will be resolved sooner than challenges to later ones, so that grievances concerning priors will usually have been resolved by the time the MSPB is ready to decide. Indeed, the collective bargaining agreement here in question calls for an arbitration decision in well under one year.[10] Although the grievance process no doubt sometimes experiences delay, there is no reason to believe that grievance

[9] This rule, under which what matters is the state of affairs in existence at the time of the MSPB's (not the agency's) decision, is entirely consistent with the MSPB's place in the statutory scheme. The MSPB's "role in relation to employing agencies" cannot "be assimilated to that of a reviewing federal court." *Douglas*, 5 M.S.P.B. at 316. The MSPB "is not a Court of Appeals but rather is itself an administrative establishment within the Executive Branch." *Id.* at 317 (internal quotation marks omitted). Thus, "from an appellate court's standpoint, [the MSPB's] action is itself part of the 'agency action' reviewed." *Id.* at 326.

[10] *See* Agreement Between National Association of Letter Carriers, AFL-CIO, and U.S. Postal Service (1994-1998), Arts. 15.2, 15.4. The agreement currently in force, which is identical in most respects to the 1994-1998 agreement, can be found at http://www.nalc.org/cau/index.html. That Agreement, incidentally, introduced an even more fast-paced arbitration procedure. *See* 1998 Agreement at 186-88.

proceedings usually proceed at a more leisurely pace than MSPB proceedings.

To the contrary, the MSPB took almost two years to decide this case, and that appears to be par for the course. *See* Office of Pol'y and Evaluation, MSPB, *Issues of Merit* (Dec. 1999), *available at* http://www.mspb.gov/studies/99decnws.pdf. Thus, it will likely be the rare case in which a later-initiated MSPB proceeding leapfrogs an earlier-initiated grievance proceeding. *Cf. Arbitration Between National Ass'n of Letter Carriers and United States Postal Service*, Case No. E94 N-4E-D 96075418, Analysis and Award at 13 (Nat'l Arbit. Panel Apr. 19, 1999) (per Carlton J. Snow) ("The parties concede that the situation in dispute arises rarely and that underlying grievances generally do not remain unresolved at the time of a removal hearing.").[11] Indeed, this case may be one of first impression: this is the first case involving leap-frogging to have arisen in the Federal Circuit, and it is not clear that the facts of any of the MSPB cases to which the Postal Service points (*see* Pet. 12 & n.7) involved actual leap-frogging.

The Postal Service nevertheless suggests that grievance proceedings take longer to resolve than MSPB proceedings, but its only evidence is the assertion that "[r]espondent's grievances challenging the June 1997 and August 1997 suspensions still are pending after more than three years." Pet. 16 n.8. There is considerable irony in that assertion. That respondent's grievances are still pending is due entirely to the Postal Service's own delay. Throughout this case, the apparent strategy of the Postal Service (evidently fearing defeat in the grievance proceedings concerning the priors) has been to have the MSPB proceeding leap-frog the pending

[11] Copies of this and another arbitral decision cited in this brief (*see infra*, p.19) have been lodged with the Clerk of this Court.

grievance proceedings — thereby enabling the Postal Service first to rely on the priors in seeking MSPB affirmance of the removal and then to insulate the priors from review on the theory that, once respondent's removal had been affirmed, she was no longer an employee and therefore no longer entitled to participate in the grievance process.[12]

The immediate practical effect of the decision below is thus limited to making gamesmanship of this nature unrewarding. And even that salutary consequence is nothing new. In grievance arbitration, it has long been the settled rule that arbitrators may not sustain disciplinary actions in reliance on unresolved priors. *See Arbitration in the Matter of United States Postal Service and National Post Office Mail Handlers*, Grievance No. MC-S-0874-D, at 7 (June 18, 1977) (per Paul J. Fasser, Jr.). That rule has hardly resulted in any of the horribles that the Postal Service now parades around. *See* Pet. 14-18. Its only noticeable effect has been to encourage

[12] The arbitrations were initially placed in abeyance pending the MSPB appeal, but, in April 1998, the union requested that the cases proceed, and they were set for a July 1998 expedited arbitration hearing. The Postal Service responded by referring the cases to non-expedited arbitration. When that did not buy enough time, the Postal Service twice (first in August 1998 and again in December 1998) invoked the so-called "Step 4" grievance procedure. *See* Agreement Art. 15.1, Step 4. Although that could not prevent a hearing in Case 1 (which took place in July 1999 and resulted in the August 1999 arbitrator's decision, *see supra*, p.6), it did succeed in forestalling hearings in Cases 2 and 3, which had been scheduled for November 1999. When the full MSPB issued its decision in October 1999, the Postal Service refused to proceed with Cases 2 and 3. In the wake of respondent's victory in the Federal Circuit, the union has sought to revive those cases, but to date they have not progressed to arbitral hearings. (Not all of the facts recounted in this footnote are in the record of this case, but neither is the Postal Service's statement that "[r]espondent's grievances challenging the June 1997 and August 1997 suspensions still are pending after more than three years." Pet. 16 n.8.)

arbitrators to schedule proceedings in the proper chronological order. *See Arbitration Between National Ass'n of Letter Carriers and United States Postal Service*, Case No. E94 N-4E-D 96075418, Analysis and Award at 9-10, 16-17 (Nat'l Arbit. Panel Apr. 19, 1999) (per Carlton J. Snow).

Besides, employees typically could not insulate priors by filing frivolous grievances. Under most collective bargaining agreements, only the union can file a grievance. *See* 5 U.S.C. § 7121(b)(1)(C); *cf. Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 564 (1976).[13] If the Postal Service means to suggest that civil servants' unions will routinely help employees in carrying out frivolous delaying tactics, that suggestion is unsupported. As this Court has recognized, unions perform a beneficial "screening" function in the grievance process that "avoids processing of frivolous claims." *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 51 (1979).

B. The Postal Service has also failed to carry its burden of showing that the Federal Circuit's rule is mistaken — let alone so mistaken as to be of concern to this Court in the absence of a conflict of authority. The decision below sensibly obviates the need to reopen MSPB proceedings that arises when relevant priors are vacated after the MSPB issues its decision. *See* Pet. 13-14. The Federal Circuit's rule thus not only prevents procedural gamesmanship but also conserves administrative resources.

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[13] For example, the collective bargaining agreement between the Postal Service and respondent's union provides for a four-step grievance procedure. Of those four steps, individual grievants can invoke only the first, which is concluded within 20 days. *See* Agreement Art. 15.1, Step 1. Each of the later steps can be invoked only by the union. *See id.* Step 1(d), Step 2(h), Step 3(d), Step 4(a).

The Postal Service nevertheless argues that a government manager's disciplinary action should be analogized to final agency action, which, it says, reviewing courts give a presumption of correctness until reversed. *See* Pet. 11-12 & n.6. But disciplinary action is not final agency action. *See supra*, p.17 n.9. Accordingly, the presumption of correctness that the Postal Service invokes is unknown in the public-employment field. It is not applied in grievance arbitration. *See supra*, p.19. And, although the Postal Service implies otherwise, it is not applied by the MSPB.[14] To the contrary, the MSPB has long allowed extensive relitigation of prior disciplinary actions: it reviews priors always under a "clearly erroneous" standard and in many cases under a "de novo" standard. *See Bolling*, 8 M.S.P.B. at 659-60; Pet. 4, 11, 13; Pet. App. 37a.

This is not surprising. Where a grievance procedure exists, the agency has through collective bargaining voluntarily relinquished rights and powers that its managers might otherwise have had. *See* 5 U.S.C. § 7106(b); *Cornelius*, 472 U.S. at 652 ("Even matters reserved to agency-management discretion, such as discipline, are subject to negotiation concerning the procedures that management officials will observe in exercising their authority."). And the result of that bargaining is invariably incompatible with the presumption of correctness that is given to final agency decisions subject to judicial review.

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[14] By quoting from *Hubbard v. United States Postal Service*, 32 M.S.P.R. 505 (1987), the Postal Service implies that the presumption of correctness is the rationale behind the MSPB precedent to which it points. *See* Pet. 12. In fact, the language quoted from *Hubbard* addressed the standard for recusal of an MSPB Administrative Judge, *see* 32 M.S.P.R. at 508 — something entirely distinct from the prior-discipline issue that happened to be addressed elsewhere in the same opinion.

Unlike final agency decisions taken by impartial administrators who have every incentive to "get it right the first time," disciplinary decisions subject to grievance are taken (often in an emotionally charged atmosphere) by managers who have a strong incentive to get it *wrong* the first time. It is the very nature of the grievance process that both sides are expected to settle their disputes.[15] Knowing that they are expected to bargain down most grievances, management has a natural incentive to "overcharge." Similarly, a grievance cannot credibly be likened to a judicial appeal. Where final agency action is the subject of judicial review, the pendency of the appeal signifies only the appellant's self-interested (and perhaps entirely unfounded) hopes. In contrast, the pendency of a grievance indicates that union officials deem the challenged disciplinary decision mistaken and the challenge sufficiently meritorious to be of interest to all employees. *See supra*, p.20.

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[15] *See, e.g.*, Agreement Art. 15.3.A ("The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 12, 2001

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Supreme Court, U.S.
FILED
JAN 25 2001
OFFICE OF THE CLERK

(3)

No. 00-758

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

MARIA A. GREGORY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

No. 00-758

UNITED STATES POSTAL SERVICE, PETITIONER

v.

MARIA A. GREGORY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

1. Respondent's attempt (Br. in Opp. 16-20) to minimize the practical significance of this case is unavailing. The Federal Circuit held "that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." Pet. App. 7a. As we have explained (Pet. 6-7, 14-18), that rule not only contradicts the longstanding administrative practice, but, if allowed to stand, will substantially impede the efforts of federal agencies to meet their statutory mandate of maintaining an efficient civil service. See 5 U.S.C. 7513(a). In particular, the court of appeals' new rule will tie the hands of federal employers in dealing with employee recidivists whose actions establish a pattern or practice of misconduct that warrants more serious discipline

than might be called for by any single incident. At the same time, the court of appeals' ruling creates an incentive for employees, especially less-than-model employees, to initiate proceedings challenging all disciplinary actions, even relatively minor ones.[1]

Claiming that those concerns "are greatly exaggerated," respondent tries (Br. in Opp. 16) to reassure the Court by observing that "the terms of the Federal Circuit's opinion do not state that agencies may never rely on unresolved priors in imposing disciplinary action," but rather "only that *the MSPB* may not rely on unresolved priors in sustaining disciplinary action." That is little comfort, however, to the numerous federal agencies whose decisions are reviewable by the MSPB. If, as the Federal Circuit held, "prior disciplinary actions that are subject to ongoing proceedings may not be used [before the MSPB] to support the reasonableness of a penalty," Pet. App. 1a-2a, then for practical purposes federal agencies—who must defend their actions before the MSPB—may not consider such prior disciplinary actions in calibrating the punishment for recidivist employees.

Respondent suggests (Br. in Opp. 17) that the Federal Circuit's new rule is "nothing more than a principle governing the scheduling of appeals: the MSPB should not decide a case until relevant priors have been arbitrated."

---

[1] Respondent's disciplinary record negates the suggestion that she was "a model employee." Br. in Opp. 3. See Pet. 2-3. Moreover, while respondent asserts (Br. in Opp. 3) that she was retaliated against by her supervisors for complaining to the Equal Employment Opportunity Commission (EEOC) and for union activities, the Merit Systems Protection Board (MSPB) considered and rejected those allegations, see Pet. App. 32a-35a, and the Federal Circuit affirmed that conclusion, see *id.* at 4a-5a. See also *id.* at 5a ("[N]o evidence was introduced that would show that discrimination or retaliation played any role in the evaluation of [respondent's] performance or penalty.").

But a rule requiring the MSPB to delay its decisions would contravene the intent of Congress in enacting the Civil Service Reform Act of 1978 (Reform Act). As this Court has observed, one of the purposes of that Act was to *streamline* the appeals process. See *United States* v. *Fausto*, 484 U.S. 439, 445 (1988) (citing S. Rep. No. 969, 95th Cong., 2d Sess. 9 (1978)). In addition, such a rule would prolong uncertainty as to the finality of important employment decisions, further disrupting the workplace to the detriment of federal employers and employees. MSPB review could be held in abeyance for months or even (as would be true in this case) years while pending grievances or other proceedings were completed.

Respondent claims (Br. in Opp. 17-18) that, "in the normal course, challenges to prior disciplinary actions will be resolved sooner than challenges to later ones, so that grievances concerning priors will usually have been resolved by the time the MSPB is ready to decide," and that, therefore, "it will likely be the rare case in which a later-initiated MSPB proceeding leapfrogs an earlier-initiated grievance proceeding." That claim is unsupported and incorrect. This case illustrates that cases can and do reach the MSPB in that posture in the ordinary course. The inherent informality of grievance proceedings often results in delay, including at the request of the parties. It is not uncommon, moreover, for parties voluntarily to defer arbitration while litigation of more serious disciplinary action is pending before the MSPB, as the parties in this case initially agreed to do.

More important, respondent's discussion of "leap-frogging" *in the MSPB* does not address the extremely common situation in which a federal agency must discipline a recidivist employee while grievance proceedings are still pending with respect to prior disciplinary actions against that employee. As discussed above, in deciding what punishment is appropriate in those circumstances, the Federal Circuit's

decision effectively requires federal employers to ignore the prior disciplinary actions—even those suggesting a pattern of misconduct threatening the efficiency of the federal workplace or the safety of individuals who work there—for as long as the actions remain subject to pending grievance proceedings that may take *years* to complete.[2]

Respondent asks (Br. in Opp. 20) this Court to dismiss the concern that recidivist employees will file frivolous grievances to insulate their prior disciplinary actions from review in connection with later misconduct on the ground that, "[u]nder most collective bargaining agreements, only the union can file a grievance." As respondent acknowledges, however, that is not true with respect to the collective bargaining agreement involved in this case. See *id.* at 6 ("A disciplined postal worker (or her union) may file a grievance pursuant to the applicable collective bargaining agreement."). Moreover, the Reform Act specifically provides that "[a]ny negotiated grievance procedure" must "assure * * * an employee the right to present a grievance on the employee's own behalf." 5 U.S.C. 7121(b)(1)(C)(ii). And, in any event, the ability of federal agencies to maintain an efficient civil service should not be subordinated to the discretion of local union officials who owe a special obligation to union members.

2. Respondent's effort (Br. in Opp. 1-2, 11-15) to show that this case is a poor vehicle to decide the important question presented is equally lacking in support. The question presented was squarely raised and decided by the

[2] In addition, it is not unusual for litigation to proceed in the MSPB while prior disciplinary actions are being challenged in the EEOC. EEOC proceedings and subsequent court appeals often take several years to complete. Under the Federal Circuit's rule, federal agencies and the MSPB could not consider a prior disciplinary action (or series of actions) that remained subject to those proceedings as well.

court of appeals below, see Pet. App. 7a, and that question is directly at issue here.

a. Contrary to respondent's suggestion (Br. in Opp. 11), the Postal Service argued below that it was entitled to consider respondent's entire disciplinary record, including disciplinary actions subject to pending proceedings, in determining the appropriate sanction for her latest infraction. In her Federal Circuit brief, respondent argued that the MSPB had erred in relying on her prior disciplinary actions in removing her, and submitted new evidence (not presented to the MSPB) that she contended supported her challenge to the prior discipline. Pet. C.A. Br. 2-4. In response, the Postal Service argued that, "[i]n determining the reasonableness of the penalty, [respondent's] disciplinary record was correctly considered." Gov't C.A. Br. 16. In addition, the Postal Service argued that respondent should not be permitted for the first time on appeal to present new evidence challenging the prior disciplinary actions. *Ibid.*

The Federal Circuit held "that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits," and vacated the MSPB's decision. Pet. App. 7a. At that point, the Postal Service filed a petition for rehearing, arguing that the new ruling was wrong as a matter of law and ill-advised as a matter of policy. See Gov't C.A. Pet. for Reh'g 11-20. In so arguing, the Postal Service elaborated on the position stated in its merits brief that the MSPB properly considered respondent's prior disciplinary record in affirming her removal. But that elaboration—in response to the court of appeals' decision overturning the longstanding administrative practice—does not now insulate the court of appeals' ruling from review in this Court.[3]

[3] Because the arguments made in the Postal Service's petition for rehearing overlapped with the position stated in the agency's merits

b. Respondent is also mistaken in claiming (Br. in Opp. 11) that the question presented "is not implicated on the facts of this case." That argument is based on the assumption that respondent's second and third disciplinary actions were based on the first action (the May 1997 letter of warning overturned by the arbitrator), and that therefore the Postal Service could not consider the second and third actions in reviewing the reasonableness of the penalty respondent received for her *fourth* infraction. See *id.* at 11-12. But respondent apparently recognizes that this assumption is not necessarily correct and, as a result, claims only—without support—that it is "likely" correct. *Id.* at 12 n.5. Moreover, respondent acknowledges that "the MSPB may be entitled to rely at least on the findings of infraction in Cases 2 and 3—even if not on the penalty imposed in those cases," *ibid.*, though the Federal Circuit held to the contrary. See Pet. App. 7a.

The Federal Circuit erroneously directed the MSPB to reevaluate respondent's removal, or direct the Postal Service to do so, without regard to any disciplinary actions subject to pending challenges. Two of respondent's prior disciplinary actions remained undisturbed. Thus, at a minimum, the MSPB should be free to consider whether respondent's latest punishment remains appropriate in light of

---

brief—*i.e.*, that, "[i]n determining the reasonableness of the penalty, [respondent's] disciplinary record was correctly considered," Gov't C.A. Br. 12—respondent is wrong in suggesting that the Postal Service was precluded from making those arguments in support of rehearing. See Br. in Opp. 11. In any event, regardless of what the Postal Service had argued in its merits brief, the Postal Service was entitled to respond in its petition for rehearing to the sweeping rule of decision that was announced by the Federal Circuit. Cf. *American Potash & Chem. Corp.* v. *United States*, 402 F.2d 1000, 1002 n.5 (Ct. Cl. 1968) (considering "new issue raised for the first time in a petition for rehearing" where "the court itself raised and discussed the question" in the panel decision).

those prior actions.[4] The *possibility* that the Board might decide in the event of a remand that respondent's removal is no longer appropriate in light of her prior disciplinary record (minus the first incident) in no way makes it "unnecessary" (Br. in Opp. 13) for this Court to decide whether that inquiry may be undertaken by the Board in the first place.[5]

---

[4] In its petition for rehearing, the Postal Service suggested that the court of appeals should "remand this action to the MSPB to determine the issue of the appropriate penalty, with instructions that the board may not consider the one prior disciplinary action that was overturned by the arbitrator." Gov't C.A. Pet. for Reh'g 20. If this Court grants certiorari and reverses the Federal Circuit's decision, however, the court of appeals could decide that such a remand would be unnecessary or inappropriate. The Reform Act provides that the Federal Circuit "shall review the record" of MSPB proceedings and set aside the findings or conclusions of those proceedings when they are unlawful. 5 U.S.C. 7703(c). Respondent did not place into the record of the MSPB proceedings the arbitrator's decision overturning the first disciplinary action (even though that decision was issued months before the MSPB's initial decision became final); instead, the Federal Circuit took "judicial notice" of the arbitrator's decision. Pet. App. 5a. Accordingly, if this Court concludes that the MSPB was entitled to consider respondent's prior disciplinary actions and reverses the court of appeals' decision, then on remand the Federal Circuit could decide that in reviewing the MSPB's decision the court was limited to "the record" (5 U.S.C. 7703(c)) that was before the MSPB, and that the MSPB's initial decision in this case should be reinstated based on that record. That result would not leave respondent without an avenue for bringing to the attention of the MSPB the arbitrator's July 1999 decision. As we have explained (Pet. 14), the MSPB has the discretion to reopen any case to reconsider its decision.

[5] In fact, in upholding respondent's removal penalty, the MSPB did not place any particular reliance on the May 1997 letter of warning that was later overturned. Instead, the Board emphasized that respondent's prior disciplinary actions had "involved unauthorized overtime," a reference to the misconduct resulting in respondent's suspension on August 18, 1997, for unrelated infractions. Pet. App. 37a. See *id.* at 37a-38a ("At first blush, a removal for one instance of failure to perform duties satisfactorily may appear unreasonable. However, *considering the appellant's prior*

c. Respondent claims (Br. in Opp. 2) that there is "no reason" why this Court should grant review in this case. The enormous practical significance of this case to the federal civil service system, however, counsels strongly in favor of deciding the question presented at this time. If the Federal Circuit's decision is allowed to stand, it will require a fundamental change in the manner in which discipline is calibrated by federal employers. Moreover, as we have explained (Pet. 6-7), it will be difficult for an agency to challenge the MSPB's refusal in a subsequent case to consider a recidivist employee's prior disciplinary actions in reviewing a penalty, because, as respondent acknowledges (Br. in Opp. 14 & n.6), agencies do not enjoy an automatic right of appeal from adverse MSPB decisions. See 5 U.S.C. 7703(a)(1); 5 U.S.C. 7703(d) (1994 & Supp. IV 1998).[6] Respondent claims (Br. in Opp. 14) that the government may ask the Federal Circuit to exercise its "discretionary jurisdiction" to accept such an appeal. But respondent does not explain why the Federal Circuit would do so to consider a question that it already has decided in this case. See note 6, *supra*. Respondent also suggests that the government may seek certiorari in this Court if the Federal Circuit denies the government's

disciplinary actions also involved unauthorized overtime, that one instance takes on additional significance and tends to reveal a pattern of conduct by the appellant to disregard the agency's and her supervisor's expectations of her performance and conduct.") (emphasis added).

[6] The Reform Act authorizes the Office of Personnel Management (OPM), not the immediately affected agency, to petition for review of an adverse MSPB ruling, and states that "[t]he granting of [such a] petition * * * shall be at the discretion of the Court of Appeals." 5 U.S.C. 7703(d). OPM invokes its right to petition for review of adverse MSPB decisions in only a few cases each year. Moreover, the Federal Circuit has held that "OPM should only bring a petition for review in 'exceptional' cases," and has indicated that the Board's decision to mitigate a penalty in a particular case ordinarily will not meet that standard. *Devine* v. *Sutermeister*, 724 F.2d 1558, 1566 (1983).

request for review. Br. in Opp. 14 n.6. But in that scenario this Court would be left without the benefit of a court of appeals' decision fleshing out the case, and the absence of such a decision would likely make such a case less appropriate for review than this one. In short, the alternative avenues of review claimed by respondent are illusory.[7]

3. Respondent devotes (Br. in Opp. 20-22) little effort to defending the court of appeals' decision on the merits. Respondent suggests, however, that the Federal Circuit's rule is supported by the fact that federal agencies do not have an incentive to make sound employment decisions in the first instance and that, instead, they actually have a "strong incentive to get [such decisions] *wrong* the first time." *Id.* at 22. That supposition is completely unfounded, ignores the presumption of correctness that is typically afforded administrative actions (see Pet. 12), and assumes that federal employers will ignore their statutory mandate to maintain an efficient civil service system.[8]

As we have explained in our petition (at 9-12), and respondent does not seriously attempt to rebut, the longstanding administrative practice is that federal employers may—and, indeed, should—consider an employee's prior disciplinary record in calibrating the punishment for subsequent misconduct, including disciplinary actions that remain the sub-

[7] As we have explained (Pet. 6), the absence of a circuit conflict does not counsel against granting certiorari in this case. And respondent acknowledges (Br. in Opp. 10) that "[b]ecause the Federal Circuit has exclusive jurisdiction over appeals from the MSPB, the decision below * * * could not conflict with the decision of any other court of appeals."

[8] Respondent claims (Br. in Opp. 21) that "disciplinary action is not final agency action." But the fact that an agency's decision to remove an employee is subject to challenge in the MSPB, a separate administrative entity, does not render the disciplinary action of the agency-employer interlocutory, or otherwise affect application of the presumption of correctness that has long been afforded agency action. See Pet. 12.

ject of a pending grievance or other proceedings. That practice is consistent with the protections afforded federal employees under the Reform Act, and promotes government efficiency. The Federal Circuit's decision in this case constitutes a stark departure from that practice. That departure is not supported by any existing federal law or policy. And it amounts to an unwarranted judicial incursion into the sensitive area of federal employer-employee relations.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2001

Supreme Court, U.S.
FILED
APR 27 2001

No. 00-758

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

MARIA A. GREGORY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED: NOVEMBER 13, 2000
CERTIORARI GRANTED: FEBRUARY 20, 2001

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UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

No. 00-3123

UNITED STATES POSTAL SERVICE, PETITIONER

v.

MARIA A. GREGORY

DOCKET ENTRIES

ENTRY NO.	DOCKET NUMBER
1.	PETITIONER'S STATEMENT CONCERNING DISCRIMINATION. (SELECTED 01) (CS-01/10/00) FILED: 01/07/00 (EDD 01/10/00 (JV) 00-3123
2.	CERTIFIED LIST FROM MSPS. (MS-01/13/00) FILED: 01/18/00. (EDD 01/21/00 BY SPP) 00-3123
	* * * * *
10.	AFFIRMED-IN-PART, VACATED-IN-PART AND REMANDED. PRECEDENTIAL OPINION BY: J. CLEVENGER,

JUDGMENT ENTERED: 05/15/00. NO COSTS. OPINION SENT TO PARTIES: 05/15/00. (EDD 05/15/00 BY KSH) 00-3123

* * * * *

11. RESPONDENT - PETITION FOR RE-HEARING [NPF] (MS-06/29/00) FILED: 06/29/00 PETITION CIRCULATED: 06/30/00 PETITION: DENIED ON 07/13/00. (EDD 07/13/00 BY AV) 00-3123

REGIONAL ARBITRATION PANEL

USPS CASE NO: H94N-4H-D 97090945
GTS NO: 036580

IN THE MATTER OF THE ARBITRATION

BETWEEN

UNITED STATES POSTAL SERVICE

AND

NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO

[Filed: Aug. 25, 1999]

BEFORE: RAYMOND L. BRITTON, *Arbitrator*

APPEARANCES:

For the U.S. Postal Service:	Jim Hildreth
For the Union:	Judy Willoughby
Place of Hearing:	U.S. Post Office
Date of Hearing:	July 20, 1999
Record Closed:	July 20, 1999

AWARD:

For the reasons given the grievance is sustained and it is directed that the seven-day suspension subsequently unilaterally reduced to a Letter of Warning be expunged from the Grievant's record.

Date of Award: August 20, 1999

/s/ RAYMOND L. BRITTON
RAYMOND L. BRITTON

ISSUE

Was there just cause to issue the 7-day suspension that was unilaterally reduced through a Step 2 decision to a Letter of Warning?

HISTORY OF THE PROCEEDINGS

The parties failed to reach agreement on this matter, and it was submitted to arbitration for resolution. Pursuant to the contractual procedures of the parties, the undersigned was appointed as Arbitrator to hear and decide the matter in dispute.

At the commencement of the hearing, it was stipulated by the parties that this matter was properly before the Arbitrator for decision and that all steps of the arbitration procedure had been followed and that the Arbitrator had the authority to render the decision in this matter. After the hearing, it was agreed that the United States Postal Service (hereinafter referred to as "Employer") and the National Association of Letter Carriers, AFL-CIO (hereinafter referred to as "Union") would present oral closing arguments in support of their respective positions.

SUMMARY STATEMENT OF THE CASE

Maria A. Gregory (hereinafter sometimes referred to as "Grievant") is a Letter Technician at the Hinesville, Georgia Post Office. On April 23, 1997, Shawn A. Thompson, Supervisor Customer Services, issued a memorandum to Maria A. Gregory, Subject: Notice of 7

Day Suspension which states in relevant part as follows (Joint Exhibit No. 2):

* * *

You are hereby notified that you will be suspended for a period of seven (7) calendar days beginning on May 17, 1997. You are to return to duty at your regularly scheduled reporting time on your first regularly scheduled day following the suspension.

CHARGE: INSUBORDINATION

On Monday, April 7, 1997, I instructed you to case your route before leaving. I repeated these instructions and each time you stated that you would not stay. You stated your child was ill and you had to get an appointment. In spite of my repeated instructions to case your route before leaving you did in fact leave without following my instructions. In this instance you were insubordinate and charged accordingly.

You have the right to file a grievance under the grievance arbitration procedure set forth in Article 15 of the National Agreement within 14 days of your receipt of this notice.

* * *

A grievance was filed protesting the Notice of 7 Day Suspension and a Step 1 meeting held and decision rendered on May 3, 1997 by Shawn A. Thompson denying the grievance.

Pursuant to Article 15 of the National Agreement, the grievance was appealed to Step 2 of the grievance procedure alleging a violation of, but not limited to, Articles 15, 16 and 19 of the National Agreement and stating in relevant part as follows (Joint Exhibit No. 2):

> **FACTS:** WHAT HAPPENED—Grievant issued a 7-day suspension charged with insubordination on Wednesday, 23 Ap 97.
>
> **UNION CONTENTIONS:** REASONS FOR GRIEVANCE—Untimely discipline. Macon policy on insubordination not followed. Grievant not given direct orders nor management informed grievant of failing to follow instructions—after repeated similar incidents occurred. Discipline unwarranted. Requested supporting documentation not provided.
>
> **CORRECTIVE ACTION REQUESTED:** Cease and desist. Grievant made whole—all records and files cleared. Grievant made whole of all and any lost wages.

On May 13, 1997, Postmaster Bill Davis in a memorandum to William S. Davis, President, Local 4944, Subject: Step 2, Grievance Decision, Maria A. Gregory, stated in relevant part as follows (Joint Exhibit No. 2)

> * * *
>
> *Step 2, hearing was held on May 9, 1997, concerning the grievance identified above.*
>
> *The grievance alleges a violation of Articles 15, 16 and 19.*

> *Union Contentions*
>
> *Untimely discipline, Discipline unwarranted.*
>
> *Facts & Management Decision*
>
> *Just cause does exist. Union does not deny the facts surrounding the April 7, 1997 incident. However, after reviewing the seriousness of the grievant's actions, the suspension is reduced to a Letter of Warning.*
>
> *The grievant has not served the suspension. Therefore, no wages were lost. The requested remedy is inappropriate and denied.*
>
> * * *

On May 22, 1997, William S. Davis in a letter to Bill Davis, Postmaster, stated in relevant part as follows (Joint Exhibit No. 2):

> * * *
>
> *Pursuant to Article 15, Section 2, Step 2.g. of the National Agreement, this letter of corrections and additions shall be included as part of the above referenced file, in response to your Step 2 decision, dated 13 May 1997 and received 14 May 1997.*
>
> *I submit the following corrections for the file:*
>
> *The union has not admitted to any "facts surrounding the April 7, 1997 incident." The union does not remember the "facts" the way management has outlined.*

Management withdrew the seven day suspension at Step 2 as it annotated on the upper top portion of the Standard Grievance Form. However, management had also prepared a letter stating that "no further action would be taken against the United States Postal Service concerning this matter" and was signed by the Union President unaware that grievant had intended/ initiated an Employee Equal Opportunity complaint. Employee did not sign document wavering any rights to EEO process. Management would not provide the union with a copy of said letter.

I submit the following additions for the file:

Grievant was disparately treated when other employees in the same situation have not been denied time to seek medical care/treatment for their dependant(s):

Paula Hall has been called in from street duty when her child was taken ill on May 7 1997.

Diane Cantrell and Melinda, rural carriers have received permission to take care of their child when taken ill.

Mark Hall has been granted time to tend to his ill mother (now deceased).

Lynnette Wynn, city carrier, has not been denied time to take care of her children when they become ill.

Bill Davis, City Carrier, allowed to go home on April 19, 1997—absence of child care provider.

Archie Burson, City Carrier, allowed to take care of his daughter in March/April time frame.

Management read the letter of suspension three times to grievant. Initial reading was done on May 23, 1997. On the same day—that afternoon—Ms. Shawn Thompson, Supervisor of Customer Services had Ms. Diane Smith, 204-B for clerk craft, sign the bottom portion of the 7-day notice of Suspension to acknowledge her witnessing grievant electing not to sign receipt of letter during the morning session. Grievant did not accept another copy with 204-B's signature—Ms. Smith was not a witness in the meeting; therefore, falsifying a document. On May 26, 1997, Ms. Thompson recd the letter once again stating that the first time the letter was read should be discarded as though it never happened. The letter from which she read from now had evidence where management had whited out Ms. Smith's signature.

During Step 1 meeting Ms. Thompson was unfamiliar with management's request for discipline letter. She stated all she was familiar with is what she puts down on her notes and the notes she makes have a different meaning from what is placed on discipline. Disciplinary actions are FAXED to Macon by Postmaster, Bill Davis, Macon prepares discipline letters and are returned to her for administrating.

Ms. Thompson was unfamiliar with Macon's policy on points to remember when "an employee refuses to carry out instructions" and did not follow the required outline.

Management intended to place grievant in jeopardy and endangering the health of a child.

Management "DID NOT" specifically state that he/she may be removed for insubordination if the instructions were not carried out immediately.

Grievant asked for ample time to obtain medical care for her dependent and would return to complete her duties as she did. Although she expressed her intent, management assigned another T-6 to complete casing grievant's route and to distribute in four parts for auxillary assistance. Grievant's child was out of school for five days due to her illness; grievant reported to work as a result of harassment from management.

Discipline towards grievant is predetermined for her union activities, employee equal opportunity activities, and for previously filing a sexual harassment compliant against a co-worker.

Management has refused to provide the union with all relevant information concerning this discipline.

On May 27, 1997, the grievance was appealed to Step 3 of the grievance procedure, alleging a violation of, but not limited to, Articles 15 and 16 and as reasons for the

appeal stated in relevant part as follows (Joint Exhibit No. 2):

* * *

Disparate treatment—endangering the health of a child. Supervisor did not state, at anytime, grievant was being insubordinate or consequences of insubordination as outlined by Macon district policy. Postmaster influenced Supervisor's decision for discipline. Management retaliation for grievant's active involvement in union activities, (Union Steward), as a participating in EEO activities and for charges brought on a co-worker for sexual harassment.

* * *

On August 15, 1997, Bernard U. Richardson, Labor Relations Specialist, Southeast Area, in a memorandum to Mr. Matthew L. Rose, National Business Agent, Subject: Regional Grievance Decision, stated in relevant part as follows (Joint Exhibit No. 2):

* * *

After considering all available evidence in the record and that offered by the union at the Step 3D hearing on August 13, 1997, it is my decision to deny the grievance.

In this case, the grievant was issued a seven (7) day suspension for, (1) insubordination. Evidence in the file indicates the grievant was guilty as charged. On Monday, April 7, 1997, the grievant was instructed to case his route before

leaving. The instructions were repeated and each time the grievant stated he would not stay. The grievant stated her child was ill and she had to get to an appointment. In spite of the instructions being repeated, the grievant did not follow the supervisors instructions. The Grievant's actions were in violation of section 666 of the Employee and Labor Relations Manual. The grievant is aware of her responsibilities in regards to following instructions and was charged accordingly. Therefore this grievance is denied.

* * *

On August 25, 1997, the grievance was appealed to arbitration.

POSITION OF THE PARTIES

The Position of the Employer

It is the position of the Employer that there was just cause for the issuance of the 7-day suspension subsequently reduced to a Letter of Warning. The Employer contends that despite being repeatedly instructed by her supervisor to case her route before leaving, the Grievant stated that she would not stay as her child was ill and she had to get to an appointment. The Employer further contends that the Grievant failed to follow instructions and that her actions were in violation of Section 666 of the Employee and Labor Relations Manual. Finally, the Employer contends that the Grievant never informed management that it was an emergency situation or that the Grievant's daughter needed medical attention.

The Position of the Union

The Union takes the position that management has the burden of proof and did not have just cause to issue a seven-day suspension on April 23, 1997, subsequently reduced to a Letter of Warning. The Union contends that no direct order was given to the Grievant nor was it stated that she may be removed for insubordination. The Union contends that the action of management was disparate, arbitrary and punitive. The Union further contends that there was no insubordination but only a misunderstanding. Finally, the Union contends that there may be an unwritten rule that employees are to follow the instructions of their supervisor but on this day there were no clear instructions given the Grievant and the Grievant came within the health related exception to the rule.

OPINION

In the resolution of this matter, the Arbitrator is called upon to determine whether under the circumstances presented, the Grievant may justifiably be found to have been insubordinate to Supervisor Shawn Thompson on Monday, April 7, 1997.

Shawn Thompson, Supervisor of Customer Service, testified that on the morning of April 7, 1997, the Postmaster told her that the Grievant would have to leave early that day because her daughter is sick. After being advised by the Postmaster that the Grievant would have to leave early that day, she went to the Grievant's case and said to the Grievant that she would have to case city route 13 and divide it up so that other carriers could deliver the route and then she could leave for the day. The Grievant replied that she would

not be able to case the route and that she would have to leave early. Supervisor Thompson states that she said nothing by way of response to the Grievant. She states that over the period of the morning this was talked about with the Grievant at least three or four times. In her discussions with the Grievant, she explained that route 13 had to be split before the Grievant left. She testified that the situation would have been different and she would have told the Grievant to go had the Grievant told her she had a 9:45 appointment or that her child was in grave need of medical attention because she could then make arrangements as to what to do with the route. The Grievant, however, never said this nor did she say that this was an emergency situation and her child needed medical attention. When she explained to the Grievant that she needed to stay, the Grievant continued to say that she had to leave. The Supervisor testified that she then went to the Union President, Bill Davis, and explained this to him and why the Grievant needed to stay. At her request, Mr. Davis talked to the Grievant. When Davis finished talking to the Grievant, she passed Davis in the exit door and he said she is leaving, she has to go. The Grievant was in the parking lot in her car ready to leave and she called out the Grievant's name and explained to the Grievant that she had to case route 13 and split it. When the Grievant said that she had to go, she states that she told the Grievant that if you go, you realize you will be A.W.O.L. She admits that the Grievant told her that she would be returning after she took her daughter to the doctor. The Grievant returned to the Post Office about two hours later and carried her route.

Based on the testimony of Supervisor Thompson, it is difficult for the Arbitrator to find that the Employer has met its burden of establishing the proof of the charge that the Grievant was insubordinate. While she may have felt that she gave the Grievant a "direct order," she admittedly did not tell the Grievant that she was giving her a (direct) order. In failing to use that term or even saying to the Grievant that she will or must stay or exercising her authority with words of a similar nature, the Supervisor allowed a situation to develop which invited misunderstanding and was fraught with ambiguity as her words were capable of being understood in two or more possible ways. The Grievant testified that after she talked to the Union President and the Supervisor and was finally ready to leave, the final words of the Supervisor to her were to do what you have to do. The Grievant testified that when she left that day, it was her understanding that she had been given permission to leave.

It is the further testimony of Supervisor Thompson that as a supervisor she never gives direct orders as this is not part of her personality and she finds doing so demeaning to the other person. It is, however, a prerequisite to a finding of insubordination that it be shown that a supervisor used clear and understandable language that leaves no room for doubt that a subordinate is being ordered to accomplish a particular act. This requirement, in the judgment of the Arbitrator, is not satisfied by stating to an employee several times, as was done in this case, that the employee is needed to perform a particular task or tasks. Not only did the Supervisor not make it clear that she was issuing a direct order but the testimony indicates that the Supervisor never told the Grievant that she did not

have permission to leave. There is a conflict in the testimony as to whether the Supervisor told the Grievant that there would be a penalty if she left. While the Supervisor testified that she reminded the Grievant that she would be A.W.O.L. if she left, the Grievant denies that the Supervisor made this statement. As the Grievant is not charged with being A.W.O.L. however, it is found by the Arbitrator to be unnecessary to this opinion that he endeavor to determine whether the testimony of the Supervisor or the Grievant is the more accurate in this regard.

It is the burden of the Employer to show by the greater weight of the evidence that the Grievant was insubordinate. In the considered judgment of the Arbitrator, the evidence submitted by the Employer is not sufficient to satisfy this burden and the Arbitrator is therefore required to find that just cause did not exist for the issuance of the 7 day suspension subsequently reduced to a Letter of Warning.

In light of the above findings, it is deemed by the Arbitrator to be unnecessary that he determine whether the Grievant came within the health related exception to the rule that employees are required to follow the instructions of their supervisors or whether the Grievant was subjected to disparate treatment.

UNITED STATES POSTAL SERVICE
SOUTH GEORGIA DISTRICT

Macon, GA. 31213-9401

DATE: January 20, 1998

OUR REF: HR:JJones:dh:9401

SUBJECT: Appeal of Maria A. Gregory
Merit Systems Protection Board
Docket No. AT-0752-98-0261-I-1

TO: MERIT SYSTEMS PROTECTION BOARD
ATLANTA REGIONAL OFFICE
401 WEST PEACHTREE STREET N.W.
SUITE 1050
ATLANTA, GEORGIA 30308-3510

Attached is Agency's response to petition for appeal filed by Maria A. Gregory.

/s/ JIM JONES
JIM JONES
Labor Relations specialist
Macon, Georgia 31213-9401

Attachment

UNITED STATES POSTAL SERVICE
SOUTH GEORGIA DISTRICT

Macon, GA. 31213-9401

TABLE OF CONTENTS

LOCATION	DATE	DOCUMENT DESCRIPTION	SOURCE
1	01/20/98	Narrative Response	Jim Jones, Agency Rep.
3	01/20/98	Statement Regarding Formal Response	Jim Jones, Agency Rep.
4a	11/17/97	Letter of Decision	Tommy L. Caruthers, Senior Labor Relations Specialist
4b	09/18/97	Notice of Proposed Removal	Joe Cox, Supervisor/ Customer Services
5	01/20/98	Certificate of Service	Jim Jones, Agency Rep.

UNITED STATES POSTAL SERVICE
SOUTH GEORGIA DISTRICT

Macon, GA. 31213-9401

NARRATIVE RESPONSE

On September 19, 1997, the Appellant was issued a Notice of Proposed Removal charging failure to perform her duties in a satisfactory manner. The Notice of Proposed Removal cited three prior disciplinary actions. As stated in the proposal, the Appellant requested 3.5 hours of overtime/auxiliary assistance to deliver her route on September 13, 1997. This request was 1.30 hours more than what was needed.

On November 26, 1997, the Appellant received a Letter of Decision from Tommy L. Caruthers, Senior Labor Relations Specialist. Mr. Caruthers considered the response offered by the Appellant before issuing his decision. No plausible explanation was provided.

LABOR RELATIONS PROCESSING CENTER

[Seal omitted]

UNITED STATES
POSTAL SERVICE™

December 17, 1997

Mr. Matthew L. Rose
National Business Agent
National Association of Letter Carriers, AFL-CIO

Southeast Area Grievance
Appeal No. H94N-4H-D 97098237 DIST 310
Dated: 06/23/97 9732H
Grievant: GREGORY M HINESVILLE GA 31313-9998

Provision Allegedly Violated: 16. 4000/ 65.0500/65.0750

Subject: Regional Grievance Decision:

Dear Mr. Rose:

After considering all available evidence in the record and that offered by the union at the Step 3D hearing on December 16, 1997, it is my decision to deny the grievance.

In this case, the grievant was issued a fourteen (14) day suspension for, (1) delaying accountable mail and (2) failure to follow instructions and. Evidence in the file indicates the grievant was guilty as charged. On April 3, 1997, the grievant failed to deliver the mail as required. This action caused the mail to be delayed. On April 10, 1997, the grievant was given instructions regarding delaying mail to be delivered. Instructions were given to the grievant to call the office and speak

to the Supervisor or the Postmaster when a situation occurred as did on April 18, 1997. The grievant failed to follow these instructions. The grievant's actions were in violation of sections 112.21 of the M-41 Handbook and section 666.53 of the Employee and Labor Relations Manual. In addition, the grievant had been previously issued a seven (7) day suspension dated April 26, 1997 for insubordination. Under the circumstances, the fourteen (14) day suspension was issued for just cause. Therefore, this grievance is denied.

In our judgment, the grievance does not involve and interpretive issue(s) pertaining to the National Agreement or any supplement thereto which may be of general application. Unless the union believes otherwise, the case may be appealed directly to regional arbitration in accordance with the provisions of Article 15 of the National Agreement.

/s/ BERNARD U. RICHARDSON
BERNARD U. RICHARDSON
Labor Relations Specialist, Southeast Area

cc: District Office Macon, Ga.
Postmaster Hinesville, Ga.
[Address illegible]

LABOR RELATIONS PROCESSING CENTER

[Seal omitted]

UNITED STATES
POSTAL SERVICE™

December 17, 1997

Mr. Matthew L. Rose
National Business Agent
National Association of Letter Carriers, AFL-CIO

Southeast Area Grievance
Appeal No. H94N-4H-D 98010952 DIST 310
Dated: 10/06/97 9745H
Grievant: GREGORY M HINESVILLE GA 31313-9998

Provision Allegedly Violated: 16. 4000/65.0500/65.1900/65.0750/74.0000

Subject: Regional Grievance Decision:

Dear Mr. Rose:

After considering all available evidence in the record and that offered by the union at the Step 3D hearing on December 16, 1997, it is my decision to deny the grievance.

In this case, the grievant was issued a fourteen (14) day suspension for, (1) delaying accountable mail, (2) unauthorized overtime/failure to follow instructions and (3) failure to perform duties in a satisfactory manner/unauthorized overtime. Evidence in the file indicates the grievant was guilty as charged. On July 17, 1997, the grievant failed to deliver 3 certified pieces of mail to 734 Bacon Road. This action caused the mail to be delayed. On July 18, 1997, the grievant made 1.24 units

of unauthorized overtime; did not fill out a PS Form 3996 or a 1571 to curtail the mail. On July 19, 1997, the grievant made .62 units of overtime, and again did not request auxiliary assistance by use of a Ps Form 3996. On July 25, 1997, the grievant requested 3.5 hours of auxiliary assistance. The request was disapproved, however, the grievant was assisted by two employees, both taking 1.5 hour of auxiliary assistance from the grievant. In spite of this action, the grievant still made 1.6 hours of overtime. Again on July 26, the grievant made 1.6 hours of overtime after having requested 1.25 hours of assistance that was given to another employee. The grievant's actions were in violation of sections 112.2 of the M-41 Handbook and section 666.53 of the Employee and Labor Relations Manual. In addition, the grievant had been previously issued a letter of warning dated May 5, 1997 for insubordination. Under the circumstances, the fourteen (14) day suspension was issued for just cause. Therefore, this grievance is denied.

In our judgment, the grievance does not involve any interpretive issue(s) pertaining to the National Agreement or any supplement thereto which may be of general application. Unless the union believes otherwise, the case may be appealed directly to regional arbitration in accordance with the provisions of Article 15 of the National Agreement.

/s/ BERNARD U. RICHARDSON
BERNARD U. RICHARDSON
Labor Relations Specialist, Southeast Area

cc: District Office Macon, Ga.
Postmaster Hinesville, Ga.
[Address illegible]

[Seal omitted]

OFFICER OF LABOR RELATIONS
UNITED STATES POSTAL SERVICE
SOUTH GEORGIA DISTRICT
451 [COLLEGE] ST
MACON GA 31213-9401

CERTIFIED MAIL #P 283 974 886

November 17, 1997

Maria Gregory
204 Elizabeth Street
Hinesville GA 31313-2115

RE: Notice of Decision, Ms. Maria Gregory, Hinesville GA.
Referencing Notice of Proposed Removal dated September 18, 1997

The following constitutes my decision regarding the above referenced notice which was issued to you, Ms. Maria Gregory, a city letter carrier of the Hinesville, Georgia Post Office. Consideration was given to your written answer issued by notice dated September 25, 1997 and your personal answer of November 14, 1997. Having considered both in conjunction with the charges levied against you, it is my decision is to uphold the removal. The reasons for my decision follow:

For the record, I am noting that, Mr. Jim Hildreth, Labor Relations Specialist, South Georgia District had originally been named as the deciding official in this action. However, due to your protesting his involvement, I was renamed as the deciding official. There was no disagreement to naming me as the deciding official in

that I had not been involved in this case prior to being named as the deciding official. This accounts for part of the delay in answering the charges.

Based on your oral and written presentation, it appears that your answer provides that, the infraction as charged was de-minimus and would not justify the action taken. You and your representative, Attorney E. Kontz Bennett, Jr., explained that, based on your analogy of the circumstances, the total time served on Route 4 equated to only .6 of an hour of additional time than what was requested. You further explained that, all procedures had been followed regarding obtaining authorization for auxiliary assistance, in accordance with the city carrier's handbook and that if you had been in error in your estimation, you would have called in to correct your estimation. All of this would have been in accordance with the M-41/M-39 handbooks which govern city delivery methods and practices. You referred to the charges as being frivolous, insubstantial and unsubstantiated. You charged that Mr. Bill Davis, Postmaster, who was present at our meeting, along with Mr. Joe Cox the issuing supervisor, as being behind all of this.

During our meeting, Mr. Cox explained that you had requested 3.5 hours of auxiliary assistance. He granted you 3 hours of auxiliary assistance, gave what he thought to be 3 hours of delivery time to three other carriers and accompanied you on the route. Based on Mr. Cox's account, you returned to the office 1.5 hours earlier than your route's scheduled end time. This would equate to an approximate 2 hour overestimation in time needed since Mr. Cox left a half hour of the time that you estimated you needed, to be delivered by you.

[You] offered that you had returned to the office 1.25 hours earlier than your scheduled end tour time. This flies in the face of your answer that there was only .6 tenth of an hour in dispute. *Even considering your account, this would still have been an over estimation of 1.75 hours which is too much for someone familiar with this route, especially considering that this is a route that you are familiar with and is one of your regular assignments.* I checked postal records prior to my leaving the Hinesville Georgia Post Office on the day of our meeting and found that you had been assigned to this route on the 4 previous work days. This is further proof that you were familiar with this route.

When repeatedly asked for an explanation as to why you made such a gross overestimation of overtime or auxiliary assistance needed, you offered no explanation that made sense. You continuously explained that you were recuperating from foot surgery and was slow. You explained other problems related to this route, such as this route being, partially, a military base and how occupants continuously moved which, made your estimation even more difficult. However, your explanation was offered to show why you had been slow in delivering the portion of the route that you did deliver. Yours was not to explain why you had made the overestimation. Why you made the overestimation is still unexplained. Mr. Cox on the other hand was impressed that you were attempting to use stalling tactics and still finished 2 hours earlier than what had been requested.

[You] offered, when questioned that, Mr. Cox, had never carried your route, but told you exactly what to

take off of your route by street name and address. He decided to give this portion of your route to three other carriers. He estimated this to be 3 hours work. Records revealed that you had records to prove that the three carriers who were given the work taken off of your route, carried the portions given to them in 2.91 hours. Mr. Cox, who had never carried the route missed his estimation by .08 of an hour. On the other hand, You, being familiar with this route, missed this estimation by approximately, 1.75 or 2 hours, depending on whose version that was used. The Postal Service normally allows for an approximate 15-20 minute difference in estimation. Yours was grossly over-stated.

The conclusion that must be drawn is that, Mr. Cox, who was had never carried the route but was familiar with city carrier work methods being a former city letter carrier, correctly estimated the time that was needed to be relieved as you requested. However, a carrier such as yourself, who regularly carries the route and had carried the route in the last 4 successive days, had overestimated the time by approximately (2) hours. *This shows that you overestimated the time needed to deliver the route on purpose for obvious reasons.*

[You] offered that you had been sent out on another route to deliver some mail when you returned early. Mr. Cox verified this in that you had returned to the office so much earlier than had been expected. This explains why your account of the amount of time spent working by you, and the three others who were given splits off of your route, equated to .6 of an hour over what you estimated. The time you offered, as a defense to your being close in your estimation, was exaggerated

by adding the time that you worked, after you returned to the office early, which you were sent back out to deliver on another route.

If Mr. Cox had not taken the time off of your route and accompanied you on the route, the evidence disclosed that you would have made the unjustified time. When questioned, Mr. Cox explained that the motive for you doing what you did was to make up for the suspension that you had been previously issued. No other explanation makes sense so I agree.

Based on the foregoing it appears that your removal will promote the efficiency of the Postal Service and is therefore warranted. Considering the elements of your past record which shows that you have engaged in similar conduct previously, have been forewarned, the nature of your infraction, your length of service and the other Douglas Factors, I find that your removal is warranted. Your removal will be made effective November 26, 1997[.]

As a preference eligible, you have the right to appeal this decision in writing to the U.S. Merit Systems Protection Board, Atlanta Regional Office, 401 West Peachtree Street, N.W. 10th Floor, Atlanta GA 30308-3510 within 20 calendar days from the effective date of this decision. If you appeal to the MSPB, you should state whether you do or do not wish a hearing and you should furnish me a copy of your appeal. For further information on appeals procedures, contact Jim Jones. Attached for your reference are a copy of the MSPB regulations and a copy of the appeal form.

If you appeal this action, you will remain on the rolls, but in a nonpay, nonduty status after the effective date

of this action, until disposition of your case has been reached either by settlement or through exhaustion of your administrative remedies.

If you appeal to the MSPB, you thereby waive access to any procedures under the National Agreement beyond Step 3 of the Grievance/Arbitration procedure. You have the right to file an MSPB appeal and a grievance on the same matter. However, if the MSPB issues a decision on the merits of your appeal, if an MSPB hearing begins, if the MSPB closes the record after you request a decision without a hearing, or if you settle the MSPB appeal you will be deemed to have waived access to arbitration. Further, if you have an MSPB appeal pending at the time the Union appeals your grievance to arbitration, or if you appeal to the MSPB after the grievance has been appealed to arbitration, you will be deemed to have waived access to arbitration.

You are entitled to a representative of your own choosing throughout your appeal. You and your representative, if he or she is a U.S. Postal Service employee, shall be afforded a reasonable amount of official time for preparation of your case if you and/or your representative are otherwise in a duty status.

If this action is overturned on appeal, back pay will be allowed, unless otherwise specified in the appropriate award or decision, *ONLY IF YOU HAVE MADE REASONABLE EFFORTS TO OBTAIN OTHER*

EMPLOYMENT DURING THE RELEVANT NON-WORK PERIOD. The extent of documentation necessary to support your back pay claim is explained in the ELM, Section 436.

/s/ TOMMY L. CARUTHERS
TOMMY L. CARUTHERS
Senior Labor Relations Specialist

Attachments: MSPB Regulations
MSPB Appeal Form
ELM Section, Section 436

Hinesville GA 31313-9998

[Seal omitted]

UNITED STATES
POSTAL SERVICE

September 18, 1997

SUBJECT: Notice of Proposed Removal

TO: Maria Gregory
City Letter Carrier
SSN: 451-94-4749
Hinesville GA 31313-9998

This letter is to serve as advance written notice that it is proposed to remove you no sooner than 30 calendar days from receipt of this notice. The reason for this action is:

CHARGE 1: Failure to Perform Your Duties in a Satisfactory Manner

Specifically, postal records indicate you requested 3.5 hours of overtime/auxiliary assistance on September 13, 1997 while assigned to case and carry route CR04. Based on a review of the mail volume and your scheduled leaving time I questioned you as to the need for such overtime/assistance. You acknowledged the need and the inability to case and carry the route with less amount of overtime/assistance. I provided you with 3 hours of auxiliary assistance and advised you I would ride the remaining portion of the route with you.

Records indicate you made your first delivery at 12:00 and made your last delivery at 15:00. Your scheduled

end of tour for September 13, 1997 was 16:30. Based on the time you requested as overtime/auxiliary assistance and the actual time utilized, you overestimated your workload by 1.30 hours. When questioned in regards to your actions you failed to provide any information to support your actions or explain the unnecessary request for overtime/assistance.

In arriving at the decision to remove you from the rolls of employment, I have given consideration to the following elements of your employment record.

- On May 13, 1997, you were issued a letter of warning for insubordination.
- On June 7, 1997, you were issued a 7-day suspension for delaying the mail and failure to follow instructions.
- On August 18, 1997 you were issued a 14-day suspension for 1) delaying accountable mail, 2) unauthorized overtime, 3) failure to follow instructions, 4) failure to perform your duties in a satisfactory manner.

You and/or your representative may review the material relied on to support the reasons for this notice at the Hinesville Post Office during the hours of 9:00 a.m. to 4:00 p.m. If you do not understand the reasons for this notice, contact me for further explanation.

You and/or your representative may answer this proposal within 10 days from your receipt of this letter, either in person or in writing or both, before James Hildreth, Labor Relations Specialist, U.S. Postal Service, 2 North Fahm St., Savannah GA 31402-9401. You

may also furnish affidavits or other written material to Mr. Hildreth within 10 days from your receipt of this letter. You will be afforded a reasonable amount of official time for the above purpose if you are otherwise in a duty status. After the expiration of the 10-day time limit for reply all the facts in the case, including any reply you submit, will be given full consideration before a decision is rendered. You will receive a written decision from Mr. Hildreth.

You have the right to file a grievance under the grievance/arbitration procedure set forth in Article 15 of the National Agreement within 14 days of your receipt of this notice.

/s/ WILLIAM J. COX
WILLIAM J. COX
Supervisor, Customer Services
Hinesville GA 31313-9998

Attachment

*I,*_____, *received this notice on* _____*Time* _____

[Illegible]

[Seal omitted]

UNITED STATES
POSTAL SERVICE

Hinesville, Georgia 31313

September 18, 1997

Subject: Step 2, Grievance Decision, Maria A. Gregory
USPS #1064
NALC #97-45H

To: William S. Davis
President, Local 4944
P O Box 1426
Hinesville, GA 31310-8426

Step 2 hearing was held on September 9, 1997 concerning the grievance identified above. The grievance alleges a violation of Articles 2, 15 & 19.

Union Contentions
Management does not have "just cause" to issue discipline. Prior elements are improperly cited.

Facts & Management Decision
The prior elements are properly cited. They are clearly related to the charges in the discipline. Insubordination and failure to follow instructions are related as is delaying the mail with delaying accountable mail.

Postal rules and regulations prohibit the actions of the grievant. The grievant was made aware of said rules and the consequences involved. The corrective action is progressive.

The union's contention that prior discipline, not yet adjudicated, can't be cited is wrong. If this were true the grievant would have immunity until adjudication.

"Just cause" is present. The grievant has not corrected the work deficiencies. Therefore, progressive corrective action is appropriate. Grievance is denied.

In addition, since the issuance of this suspension the grievant has continued to delay mail, failed to follow instructions and performed such that unauthorized overtime resulted. Specifically on August 12th and 15th, 1997, the grievant committed these same infractions. Clearly progressive discipline has not been sufficient to correct the deficiencies.

/s/ BILL DAVIS
BILL DAVIS
Postmaster

LABOR RELATIONS PROCESSING CENTER

[Seal omitted]

UNITED STATES
POSTAL SERVICE™

August 15, 1997

Mr. Matthew L. Rose
National Business Agent
National Association of Letter
Carriers, AFL-CIO

Southeast Area Grievance
Appeal No. H94N-4H-D
97090945 DIST 310
Dated: 06/02/97 9721H
Grievant: GREGORY M
HINESVILLE GA
31313-9998

Provision Allegedly Violated: 16. 4000/
65.0750/65.1400

Subject: Regional Grievance Decision:

Dear Mr. Rose:

After considering all available evidence in the record and that offered by the union at the Step 3D hearing on August 13, 1997, it is my decision to deny the grievance.

In this case, the grievant was issued a seven (7) day suspension for, (1) insubordination. Evidence in the file indicates the grievant was guilty as charged. On Monday, April 7, 1997, the grievant was instructed to case his route before leaving. The instructions were repeated and each time the grievant stated he would not stay. The grievant stated her child was ill and she had to get to an appointment. Inspite of the instructions being repeated, the grievant did not follow the supervisors instructions. The grievant's actions were

in violation of section 666 of the Employee and Labor Relations Manual. The grievant is aware of her responsibilities in regards to following instructions and was charged accordingly. Therefore this grievance is denied.

In our judgment, the grievance does not involve any interpretive issue(s) pertaining to the National Agreement or any supplement thereto which may be of general application. Unless the union believes otherwise, the case may be appealed directly to regional arbitration in accordance with the provisions of Article 15 of the National Agreement.

/s/ BERNARD U. RICHARDSON
BERNARD U. RICHARDSON
Labor Relations Specialist, Southeast Area

cc: District Office Macon, Ga.
Postmaster Hinesville, Ga.
[Address illegible]

HINESVILLE GA 31313-9998

[Seal omitted]

UNITED STATES
POSTAL SERVICE

August 7, 1997

SUBJECT: Notice of Fourteen (14) Day Suspension

TO: Maria Gregory
SSN: 451-94-4749
City Carrier
Hinesville GA 31313-9998

You are hereby notified that you will be suspended for a period of (14) fourteen calendar days beginning on August 18, 1997. You are to return to duty at your regularly scheduled reporting time on your first regularly scheduled day following, August 31, 1997.

CHARGE 1: Delaying Accountable Mail

On 7/17/97 you were delivering mail on CR11. You failed to deliver 3 certified pieces to 734 Bacon Road. Your actions caused mail to be delayed. This is a serious offense that the Postal Service does not take lightly. You are hereby charged accordingly.

CHARGE 2: Unauthorized Overtime/Failure to Follow Instruction

On Friday 7/18/97, you were assigned to CR7. On this day, you made 1.24 units of unauthorized overtime. You did not complete a PS Form 3996 or 1571 to curtail mail.

On 7/19/97, you made .62 units of unauthorized overtime. You did not request auxiliary assistance via PS Form 3996. By virtue of the above listed unauthorized overtime, you are being charged accordingly.

Charge 3: Failure to Perform Your Duties in a Satisfactory Manner/Unauthorized Overtime

On 7/25/97 you requested 3.5 hours of auxiliary assistance. Your request was disapproved but I sent K. Chipple and A. Burson to assist you by both taking 1.5 hours of auxiliary assistance off of you. In spite of this you still made 1.6 hours of overtime. Part of the reason that this occurred was due to the fact that you took all of the "hold mail" out to attempt delivery, which is contrary to the purpose of holding mail. In addition, you cleaned out cluster boxes which I told you was the responsibility of the regular carrier and not the T-6 carrier which you were.

On 7/26/97 you requested 1.25 hours of auxiliary assistance. I gave the auxiliary assistance to A. Burson. In spite of this you still made 1.56 hours of overtime. In addition to this, when Mr. Burson came to get the split that he was to carry off of your route you would not give him the mail causing him to have to get the mail himself. After you returned to the office, it was found that you had taken out hold mail again and mail that you had cleaned out of customers boxes which as previously explained was the regular carrier's duty.

The above two cited incidents chronicle behavior intended to expand your street time for the purpose of making overtime. In this regard you are accordingly charged.

In addition, the following prior elements for your past record have been considered in arriving at this decision.

- 5/13/97 Letter of Warning Insubordination
- 6/7/97 7 Day Suspension Delaying Mail/Failure to Follow Instructions

You have the right to file a grievance under the grievance/arbitration procedure set forth in Article 15 of the National Agreement within 14 days of your receipt of this notice.

/s/ WILLIAM J. COX
WILLIAM J. COX
Supervisor Customer Services
Hinesville GA 31313-9998

I,_____received this notice on____Time _____

Employee refused to sign, Witness by Bill Davis 8-7-97 at 4:38 pm

[Seal omitted]

UNITED STATES
POSTAL SERVICE

Hinesville, Georgia 31313-9998

June 7, 1997

Subject: Step 2, Grievance Decision, Maria A. Gregory
USPS #1051
NALC # 97-32H

To: William S. Davis
President, Local 4944
P O Box 1426
Hinesville, GA 31310-8426

Step 2: hearing was held on May 29, 1997, concerning the grievance identified above. The grievance alleges a violation of Articles 15 and 16.

Union Contentions
Grievant treated disparately.

Facts & Management Decision
"Just Cause" exist for the suspension which is hereby reduced from 14 calendar days to 7 calendar days. The 7 day suspension will begin June 28, 1997 and end July 4, 1997. The unions contentions are without merit. The previous Letter of Warning can we relied upon because it has not been overturned at any step in the grievance procedure. Grievant's explanation of events does not excuse her actions. Had grievant been performing

duties as required by the M-41 the mail would not have been delayed. Grievance is denied.

/s/ BILL DAVIS
BILL DAVIS
Postmaster

cc: Maria A. Gregory

[Seal omitted]

UNITED STATES
POSTAL SERVICE

Hinesville, Georgia 31313-9998

May 13, 1997

Subject: Step 2, Grievance Decision, Maria A. Gregory
USPS #1051
NALC # 97-21H

To: William S. Davis
President, Local 4944
P O Box 1426
Hinesville, GA 31310-8426

Step 2, hearing was held on May 9, 1997, concerning the grievance identified above. The grievance alleges a violation of Articles 15, 16 and 19.

Union Contentions
Untimely discipline, Discipline unwarranted.

Facts & Management Decision
Just cause does exist. Union does not deny the facts surrounding the April 7, 1997 incident. However, after reviewing the seriousness of the grievant's actions, the suspension is reduced to a Letter of Warning.

The grievant has not served the suspension. Therefore, no wages were lost. The requested remedy is inappropriate and denied.

/s/ BILL DAVIS
BILL DAVIS
Postmaster

cc: Maria A. Gregory
Grievant

HINESVILLE GA 31313-9998

[Seal omitted]

UNITED STATES
POSTAL SERVICE

April 30, 1997

SUBJECT: Notice of Fourteen (14) Day Suspension

TO: Maria Gregory
City Letter Carrier
SSN: 451-94-4749
Hinesville GA 31313-9998

You are hereby notified that you will be suspended for a period of fourteen (14) calendar days beginning June 21, 1997. You are to return to duty at your regularly scheduled reporting time on your first regularly scheduled day following July 4, 1997.

CHARGE 1: Delaying of Mail

On April 18, 1997, you brought mail back to the office. This mail was from route C-13. You cased and carried C-16 on this day. After receiving help on the street you returned with the portion of C-13 that you were to deliver. Your actions caused this mail to be delayed and you are charged accordingly.

CHARGE 2: Failure to Follow Instructions

On April 10, 1997, you were given instructions regarding delaying mail delivery. Instructions were given to call the office and speak to a supervisor or Postmaster when a carrier had a situation like you had on April 18, 1997. Your failure to follow these instruc-

tions contributed to the unnecessary delay of mail. Therefore, you are charged accordingly

In addition, the following prior elements of your past record have been considered in arriving at this decision.

• On April 26, 1997 you were issued a 7-day suspension for insubordination.

You have the right to file a grievance under the grievance/arbitration procedure set forth in Article 15 of the National Agreement within 14 days of your receipt of this notice.

/s/ SHAWN A. THOMPSON
SHAWN A. THOMPSON
Supervisor, Customer Svcs.
Hinesville, GA 31313-9998

I,_____received this notice on____Time _____

Employee refused to sign. Witness: Bill Davis 4-30-97 6:18 pm

[Seal omitted]

UNITED STATES
POSTAL SERVICE

Hinesville, Georgia 31313-9998

April 23, 1997

Subject: Notice of 7 Day Suspension

To: Maria A. Gregory
City Letter Carrier
SSN: 451-94-4749
Hinesville, GA 31313-9998

You are hereby notified that you will be suspended for a period of seven (7) calendar days beginning on May 17, 1997. You are to return to duty at your regularly scheduled reporting time on your first regularly scheduled day following the suspension.

CHARGE: INSUBORDINATION

On Monday, April 7, 1997, I instructed you to case your route before leaving. I repeated these instructions and each time you stated that you would not stay. You stated your child was ill and you had to get an appointment. In spite of my repeated instructions to case your route before leaving you did in fact leave without following my instructions. In this instance you were insubordinate and charged accordingly.

You have the right to file a grievance under the grievance/arbitration procedure set forth in Article 15

of the National Agreement within 14 days of your receipt of this notice.

/s/ SHAWN A. THOMPSON
SHAWN A. THOMPSON
Supervisor, Customer Services

I,_____received this notice on____Time _____

Employee refused to sign, Witness by Bill Davis 4-26-97 at 10:55

APR 27 2001

Supreme Court, U.S.
FILED
APR 27 2001
OFFICE OF THE CLERK

No. 00-758

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

MARIA A. GREGORY

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a federal agency, when disciplining or removing an employee for misconduct pursuant to the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, may take account of prior disciplinary actions that are the subject of pending grievance proceedings.

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In the Supreme Court of the United States

No. 00-758

UNITED STATES POSTAL SERVICE, PETITIONER

v.

MARIA A. GREGORY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 212 F.3d 1296. The opinion of the Merit Systems Protection Board (Pet. App. 9a-12a) is unpublished, but the decision is noted at 84 M.S.P.R. 619 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 15, 2000. A petition for rehearing was denied on July 13, 2000 (Pet. App. 44a). On October 2, 2000, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 13, 2000. The petition for a writ of certiorari was filed on November 13, 2000, and was granted on February 20, 2001. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*) are reproduced at Pet. App. 45a-58a.

STATEMENT

1. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, "comprehensively overhauled the civil service system" and established a "new framework for evaluating adverse personnel actions against [federal employees]." *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (internal quotation marks omitted). In particular, the Act gave "agencies greater ability to remove or discipline expeditiously employees who engage in misconduct," *Cornelius* v. *Nutt*, 472 U.S. 648, 662-663 (1985) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 51 (1978)), because of "complain[ts]" that the "complex rules and procedures" that had developed under the prior regime to "protect employees from arbitrary management actions ha[d] too often become the refuge of the incompetent employee," S. Rep. No. 969, *supra*, at 3.

The CSRA authorizes federal agencies to take adverse action against a covered employee—including removal, suspension, or demotion—"for such cause as will promote the efficiency of the service." 5 U.S.C. 7503(a), 7513(a). Affected employees, however, enjoy significant procedural protections in defending against such actions, including the right to counsel or another representative, the right to receive advance notice of the proposed action, an opportunity to respond orally and in writing, and a written statement of the reasons for the action. 5 U.S.C. 7503(b), 7513(b). An employee who receives a suspension of greater than 14 days, or more severe penalty such as removal, may appeal the

agency's decision to the Merit Systems Protection Board (MSPB). 5 U.S.C. 4303(e), 7513(d), 7701; see 5 C.F.R. 1201.3.

The MSPB must sustain the agency's decision if it is supported by a preponderance of the evidence and the employee does not show that the decision was the result of "harmful error in the application of the agency's procedures," a prohibited employment practice such as discrimination, or another violation of law. 5 U.S.C. 7701(c)(2)(A). An employee may obtain review of an adverse MSPB decision in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703; 28 U.S.C. 1295(a)(9). However, the Federal Circuit owes the MSPB's decision considerable deference. The Federal Circuit may set aside the Board's decision only if it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. 7703(c).

The CSRA also provides an alternative avenue for challenging adverse agency actions, including less serious disciplinary actions not subject to MSPB review.[1] An employee who is a member of a union may challenge a disciplinary action by invoking the grievance procedure set forth in the governing collective bargaining agreement. 5 U.S.C. 7121. The grievance may be

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[1] Federal employees who receive suspensions of 14 days or less are entitled to basic procedural protections afforded by Section 7513—*i.e.*, notice, an opportunity to respond, representation, and a written decision, 5 U.S.C. 7503(b)—but they are not entitled to appeal adverse decisions to the MSPB. However, employees may challenge such short-term suspensions or other less severe disciplinary actions, pursuant to the grievance procedure established by the pertinent collective bargaining agreement. 5 U.S.C. 7121.

presented by the employee or by a union representative on the employee's behalf. 5 U.S.C. 7121(b)(1)(C)(i)-(ii). Any grievance procedure must provide that either the agency or the union may invoke binding arbitration. 5 U.S.C. 7121(b)(1)(C)(iii). An employee who is the subject of a major adverse action, such as a suspension of greater than 14 days or removal, has the option either to appeal the action to the MSPB or to challenge it pursuant to a negotiated grievance procedure, "but not both." 5 U.S.C. 7121(e)(1).

2. Respondent is a covered federal employee under the CSRA. 5 U.S.C. 7511(a)(1)(B)(ii) and (b)(8). The United States Postal Service (Postal Service) employed her as a letter technician until she was removed in November 1997 for unsatisfactory performance. Pet. App. 1a. The responsibilities of a letter technician resemble those of a regular mail carrier, but are more extensive. Letter technicians must be familiar with five mail routes, rather than one. Letter technicians also must train new carriers, report route problems, and provide assistance on other routes. Before they begin a mail delivery route, letter technicians (like regular carriers) must complete a form stating whether they need additional assistance or overtime to complete the route. The Postal Service holds all carriers to a high standard in accurately completing such forms, requiring letter technicians and carriers to estimate the time required to complete a route within a margin of error of 15 to 20 minutes. *Id.* at 15a-16a.

Respondent was disciplined on three separate occasions between May 1997 and August 1997. On May 13, 1997, respondent received a letter of warning for insubordination after she left work for a doctor's appointment without first putting her day's mail in order. Pet. App. 2a, 36a. Less than a month later, on June 7, 1997,

respondent received a seven-day suspension for delaying the mail and failing to follow instructions. *Id.* at 2a. Two months later, on August 7, 1997, respondent received a 14-day suspension for delaying the mail, claiming unauthorized overtime, failing to follow instructions, and performing her duties in an unsatisfactory manner. *Ibid.* In providing notice of the charge, respondent's supervisor recounted that respondent had "made 1.24 units of unauthorized overtime" on July 18, 1997, and another ".62 units of unauthorized overtime" the following day, and that on July 25 and 26, respondent had delayed her "street time for the purpose of making [unauthorized] overtime." J.A. 38-39. The union representing respondent filed grievances challenging each of those disciplinary actions pursuant to the procedure established by the pertinent collective bargaining agreement. Pet. App. 5a.

On September 13, 1997, after serving her 14-day suspension, respondent requested 3.5 hours of overtime (or assistance from another carrier) to prepare and deliver the mail on her route. Pet. App. 14a. That request "seemed like a gross overestimate" to respondent's supervisor. *Id.* at 17a. The supervisor later testified that respondent had "a low volume of mail" on the day in question; that he could not recall another request for so much overtime during a non-holiday period; and that any request for more than two hours of overtime "sends up a red flag." *Ibid.* The supervisor reassigned some of respondent's mail to other letter carriers and accompanied respondent on her route. *Id.* at 17a-18a. The supervisor observed no unusual conditions on the route, and respondent did not appear to suffer any physical impairment. *Id.* at 18a-19a. On the basis of his observations and the amount of time actually taken by respondent and the other letter carri-

ers, the supervisor charged respondent with overestimating her time by 1.5 hours, far in excess of the 15-to-20-minute margin of error allowed for letter carriers. *Id.* at 15a, 29a.

On September 18, 1997, the supervisor gave respondent written notice that he proposed removing her for unsatisfactory performance. J.A. 31-33. In the notice of proposed removal, the supervisor focused on respondent's September 1997 overtime request, but also stated that he had considered respondent's prior disciplinary record. J.A. 32. Respondent replied to the letter through an attorney and met with a senior personnel officer. On November 17, 1997, the officer issued a removal decision, concluding that respondent's "removal will promote the efficiency of the Postal Service." J.A. 28. In so finding, the personnel officer explained that he could not credit respondent's explanation for her September 1997 overtime request. J.A. 25-28. The personnel officer also pointed to respondent's prior disciplinary record with respect to "similar conduct." J.A. 28. Respondent was dismissed from the Postal Service effective November 26, 1997.

3. Respondent appealed the Postal Service's decision to the MSPB. 5 U.S.C. 7701(a). She argued that, among other things, her removal was motivated by discrimination upon the basis of her race, sex, age, and disabled status, and constituted retaliation for her filing of 32 discrimination complaints with the agency's Equal Employment Opportunity (EEO) office. After two days of hearings, an administrative judge of the MSPB affirmed the Postal Service's decision to remove respondent, finding that "[respondent]'s removal promotes the efficiency of the [civil] service." Pet. App. 40a. The administrative judge upheld the Postal Service's finding that respondent failed to perform her

duties in a satisfactory manner, *id.* at 14a-30a, and rejected respondent's affirmative defenses of discrimination and retaliation, *id.* at 30a-35a, finding "no evidence" that the Postal Service had acted against respondent on any improper basis. *Id.* at 30a, 32a, 35a.

The administrative judge also upheld the penalty of removal. Pet. App. 36a. The administrative judge recognized that, in deciding to remove respondent, the Postal Service had relied upon the nature of the charge, "the fact that there was no room for [respondent's overestimate] to have been a mistake," and respondent's history of similar offenses. *Ibid.* Because the prior disciplinary actions against respondent were in writing, a matter of record, and subject to grievance, the administrative judge limited review of those earlier actions to determining whether they were clearly erroneous. *Id.* at 37a (citing *Bolling* v. *Department of the Air Force*, 8 M.S.P.B. 658, 659-661 (1981)). Respondent did not argue in support of her appeal that the prior actions against her were improper. Nevertheless, the administrative judge reviewed those actions and found that they were not clearly erroneous, and therefore concluded "that the agency properly considered [respondent]'s prior disciplinary actions." *Ibid.*

The administrative judge further found that respondent's removal was "within the bounds of reasonableness." Pet. App. 39a. The administrative judge explained that, "[a]t first blush, a removal for one instance of failure to perform duties satisfactorily may appear unreasonable." *Id.* at 37a. But, in light of the fact that "[respondent]'s prior disciplinary actions also involved unauthorized overtime, that one instance takes on additional significance and tends to reveal a pattern of conduct by [respondent] to disregard the agency's and her supervisor's expectations of her performance and

conduct." *Id.* at 37a-38a. The administrative judge also found that respondent's latest "overestimate" of her route time was "intentional," *id.* at 38a, and that respondent's own MSPB testimony indicated that she still "refuses to accept the instructions" of her supervisors and, thus, "has little potential for rehabilitation," *id.* at 39a.

Respondent petitioned the full Board for review of the administrative judge's decision. 5 C.F.R. 1201.114. While that petition was before the MSPB, an arbitrator sided with respondent in resolving the grievance filed in response to the first disciplinary action—the May 1997 letter of warning for insubordination, which did not involve an overtime estimate—and ordered that the warning be expunged from respondent's record. Pet. App. 5a; see J.A. 3-16. Respondent did not advise the MSPB of that ruling. The Board denied respondent's petition for review on October 20, 1999, concluding that respondent had not provided any "new, previously unavailable, evidence," and that "the administrative judge made no error in law or regulation that affects the outcome." Pet. App. 9a-10a. Although the MSPB's rules permit the Board to reopen a decision for reconsideration in light of new evidence or any other consideration, 5 C.F.R. 1201.118, respondent never moved to reopen the MSPB's decision.

4. Respondent petitioned for review of the MSPB's decision in the Federal Circuit, 5 U.S.C. 7703(a), and that court affirmed in part, vacated in part, and remanded for further proceedings. Pet. App. 1a-8a. Deciding the case without argument, the court affirmed the MSPB's determination that respondent failed to perform her duties in a satisfactory manner, as well as the MSPB's rejection of respondent's discrimination and retaliation claims. *Id.* at 4a-5a; see *id.* at 5a ("[N]o

evidence was introduced that would show that discrimination or retaliation played any role in the evaluation of [respondent's] performance or penalty."). Nonetheless, the court vacated the MSPB's approval of the removal penalty on the ground that the MSPB "erred when it rested its analysis of the reasonableness of the penalty upon her three prior disciplinary actions, at least some of which were then the subject of grievance proceedings." *Id.* at 5a.

Although petitioner never brought the arbitrator's decision to the MSPB's attention, the court of appeals took "judicial notice" that an arbitrator had overturned the Postal Service's May 1997 letter of warning to respondent, and that other grievances to respondent's disciplinary record remained pending. Pet. App. 5a-6a. More broadly, the court of appeals "h[e]ld that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." *Id.* at 7a. "To conclude otherwise," the court reasoned, "would risk harming the legitimacy of the reasonable penalty analysis, by allowing the use of unreliable evidence (the ongoing prior disciplinary actions) to support an agency action." *Ibid.* Thus, because the MSPB relied upon "prior actions that were the subject of ongoing grievance proceedings" in concluding that respondent's removal was reasonable, the court concluded that "the Board abused its discretion," and vacated its decision. *Ibid.* The court remanded to the MSPB for a determination whether the case should be sent back to the Postal Service for it "to select a penalty in light of the precise status of [respondent]'s prior disciplinary record," or whether the MSPB itself should set a new penalty. *Id.* at 7a-8a.

On July 13, 2000, the court of appeals denied the Postal Service's petition for rehearing. Pet. App. 44a.

SUMMARY OF ARGUMENT

The Federal Circuit erred in holding that, in disciplining or removing employees pursuant to the CSRA, federal agencies may not consider prior disciplinary actions that are subject to pending grievances. Both longstanding administrative practice and common sense support the MSPB's rule that agencies may consider an employee's disciplinary record—without regard to pending grievances—in calibrating the discipline for subsequent misconduct. That rule is not arbitrary, capricious, or otherwise contrary to law. 5 U.S.C. 7703(c). Accordingly, it should be given effect.

A. The CSRA overhauled the civil service system with the objective of making the system more efficient and effective. Congress established several merit principles to guide federal personnel matters, including the principles that "inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards." 5 U.S.C. 2301(b)(6). In addition, Congress sought to give federal agencies more leeway in disciplining or removing employees for incompetence, while protecting legitimate employee rights. As part of the overhaul, Congress established the MSPB and vested it with authority to adjudicate challenges to agency action taken pursuant to the CSRA. In performing that role, Congress intended the MSPB to act as a "watch dog" over the merit system in practice. Congress specifically limited the scope of judicial review of MSPB decisions. 5 U.S.C. 7703(c).

B. For nearly two decades, the MSPB has followed the common sense rule that federal agencies may rely

on an employee's disciplinary record in assessing the appropriate discipline for subsequent misconduct, without regard to whether prior disciplinary actions are subject to pending grievances. At the same time, however, the MSPB permits employees to challenge an agency's reliance on such prior actions and to attack the prior actions collaterally under a framework that specifically takes into account the procedural protections that the employee received in the prior action. *Bolling* v. *Department of the Air Force*, 8 M.S.P.B. 658 (1981). In addition, if a prior action is set aside *after* the MSPB has affirmed an agency decision relying upon that action, the Board can reopen its decision and reconsider whether the agency decision remains appropriate. 5 C.F.R. 1201.118.

C. The MSPB's longstanding procedure "promote[s] the efficiency of the service." 5 U.S.C. 7513(a). Experience teaches that recent disciplinary history is highly relevant in assessing an employee's competence for continuing service. That is particularly true where an employee engages in a pattern or practice of misconduct that, when considered as a whole, warrants more serious action than might be appropriate in response to a single infraction standing alone. Allowing federal agencies to consider an employee's disciplinary record—without regard to pending grievances—also promotes the merit system principles. 5 U.S.C. 2301. Indeed, considering an employee's prior record is necessary to ensure that "inadequate performance [is] corrected" and to separate employees "who cannot or will not improve their performance." 5 U.S.C. 2301(b)(6).

D. In overturning the MSPB's longstanding rule, the Federal Circuit fundamentally misconceived the limited scope of its review under the CSRA and improperly

substituted its policy judgment for that of the Board. The court of appeals' review is limited to determining whether the MSPB's rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 7703(c)(1). Nothing in the CSRA *prevents* an agency from considering prior disciplinary actions in deciding what discipline is appropriate, even when the prior actions remain subject to grievances. And, in fact, foreclosing consideration of an employee's recent disciplinary record would disserve the objectives of the Act, without advancing legitimate employee rights.

Although the Federal Circuit did not "doubt" (Pet. App. 6a) the importance of considering an employee's prior disciplinary record, the court's rule makes meaningful consideration of an employee's prior record difficult, if not impossible. Because grievance proceedings typically take several months or years to complete, the court's rule would prevent federal agencies from taking into account substantial aspects of an employee's disciplinary record, and indeed, the most recent and therefore most relevant aspects of that record. That, in turn, would effectively prevent an agency from employing graduated disciplinary measures against employees "who cannot or will not improve their performance." 5 U.S.C. 2301(b)(6). The Federal Circuit precluded reliance on prior actions subject to grievances without applying appropriate deference to either the MSPB or the employing agency, both of which favored consideration of the employee's full record.

The Federal Circuit's rule creates counterproductive incentives for employees to abuse grievance procedures. Because the rule immunizes employees from cumulative discipline for as long as prior disciplinary actions remain subject to pending grievances, the rule

provides employees with an incentive to challenge practically any disciplinary action, even minor ones, and to prolong such proceedings for as long as possible. Such challenges not only provide no basis for disregarding the challenged disciplinary action, but also impose an added burden on the administrative and judicial review process established by the CSRA. That added burden, in turn, could interfere with the rights of employees who have been wrongfully aggrieved by adverse agency action, but find themselves caught in a backlog of cases created by strategic grievances or appeals.

Nor is the Federal Circuit's rule compelled by any principle of due process. Aggrieved employees enjoy more than ample process in challenging an agency's reliance on prior disciplinary actions that remain subject to pending grievances. The employee can challenge the agency's reliance on the prior disciplinary actions consistent with the *Bolling* framework, which allows for some review of *all* prior actions on which the agency relied and for de novo review of any prior actions that were not accompanied by procedural protections. Moreover, if a prior action is ultimately overturned or modified, the employee may invoke the Board's reopening procedure, under which the Board can reconsider its decision at any time in light of any later development. 5 C.F.R. 1201.118.

The Federal Circuit erroneously held that discipline of a federal employee may not be based on prior disciplinary actions that are subject to pending grievance. Its judgment vacating the decision of the MSPB in this case should be reversed and the case remanded for further proceedings.

ARGUMENT

IN DISCIPLINING OR REMOVING A FEDERAL EMPLOYEE FOR MISCONDUCT PURSUANT TO THE CIVIL SERVICE REFORM ACT OF 1978, FEDERAL AGENCIES MAY TAKE ACCOUNT OF PRIOR DISCIPLINARY ACTIONS THAT ARE SUBJECT TO PENDING GRIEVANCE PROCEEDINGS

With nearly three million civilian employees, United States Office of Personnel Management, *The Fact Book: Federal Civilian Workforce Statistics* 8 (2000), the federal government is the Nation's largest employer. Federal agencies inevitably must deal with instances of employee misconduct and unsatisfactory performance. Like their private-sector counterparts, federal employers seek to calibrate disciplinary action to the specific circumstances presented by an employee's record, including not only the circumstances surrounding the current infraction but also any relevant prior disciplinary actions against the employee. Like private-sector employers, federal agencies consider employees' disciplinary records as a matter of common sense. In addition, federal agencies are guided by the statutory merit principle that employees "who cannot or will not improve their performance" should be "separated." 5 U.S.C. 2301(b)(6). A recidivist employee who has repeatedly engaged in similar misconduct has demonstrated that she "cannot or will not improve" her performance. As the court of appeals recognized below, "[t]here is no doubt that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given circumstances." Pet. App. 6a (citing cases). We do not understand respondent to quarrel with that common sense proposition.

The question presented in this case is whether federal employers may take account of prior disciplinary actions that are subject to pending grievances. As we explain below, the longstanding rule followed by federal employers and the MSPB is that such prior actions may be considered in assessing the appropriate discipline for repeated misconduct. The Federal Circuit held that the MSPB erred when—consistent with that settled rule—the Board relied upon respondent's prior disciplinary actions in affirming the Postal Service's decision to remove respondent, when those actions remained subject to pending grievances. Pet. App. 2a, 8a. That decision denies federal employers the opportunity to consider any prior disciplinary action subject to a grievance, no matter how relevant to the present personnel action. The Federal Circuit did not identify any authority that compelled that result. As we explain below, its decision defies common sense, undermines the efficiency of the federal service, and should not stand.

A. The CSRA Vested The MSPB With Authority To Adjudicate Disputes Arising Under The Merit System

1. Before the enactment of the CSRA, there was widespread belief that the "merit principle" had suffered under the civil service system. S. Rep. No. 969, *supra*, at 3. As President Carter stated in his message transmitting proposed legislation to Congress, while the prior system had succeeded in developing "a Federal work force which is basically honest, competent, and dedicated," "the system has serious defects," including that it "neglects merit," "tolerates poor performance," and "permits abuse of legitimate employee rights." H.R. Rep. No. 1396, 95th Cong., 2d Sess. 2 (1978) (quoting transmittal message). As a result of

those defects, morale suffered among federal employers and employees, and the public perceived that the civil service system had "too often become the refuge of the incompetent employee." S. Rep. No. 969, *supra*, at 3.

The CSRA overhauled that system with the objective of making the federal government more "efficient and effective" by "[a]llow[ing] civil servants to be able to be hired and fired more easily, but for the right reasons." S. Rep. No. 969, *supra*, at 4. To that end, Congress adopted several "merit system principles," and directed that "[f]ederal personnel management should be implemented consistent with th[ose] * * * principles." 5 U.S.C. 2301(b). Those principles include the following:

> (4) All employees should maintain high standards of integrity, conduct, and concern for the public interest.
>
> (5) The Federal work force should be used efficiently and effectively.
>
> (6) Employees should be retained on the basis of the adequacy of their performance, inadequate performance should be corrected, and employees should be separated who cannot or will not improve their performance to meet required standards.

5 U.S.C. 2301.

2. The MSPB was an important component of the civil service scheme established by the CSRA. Before the CSRA, the Civil Service Commission had the responsibility for both personnel management and overseeing the merit system, a dual role that many concluded could not be well-served by one agency. S. Rep. No. 969, *supra*, at 5, 24. The CSRA abolished the Commission and replaced it with two agencies: the

Office of Personnel Management (OPM) and the MSPB. Congress gave OPM the central responsibility for "personnel management and agency advisory functions," *id.* at 5; see 5 U.S.C. 1101-1105, and Congress "charged" the MSPB "with insuring adherence to merit system principles and laws," S. Rep. No. 969, *supra*, at 5; see 5 U.S.C. 1204. See also S. Rep. No. 969, *supra*, at 6 ("The [MSPB] * * * is made responsible for safeguarding the effective operation of the merit principles in practice."); *id.* at 24 ("The [MSPB] is charged with protecting the merit system."); H.R. Rep. No. 1396, *supra*, at 5 (The MSPB was established "to serve as a 'watch dog' over the integrity of the merit system.").

To enable the MSPB to fulfill that "watch dog" role, Congress gave the Board "primacy" over the "administrative resolution of disputes over adverse personnel action," *United States* v. *Fausto*, 484 U.S. 439, 449 (1988), and vested it with broad adjudicatory powers. See 5 U.S.C. 1204(a), 4303(e), 7513(d), 7701(a). As this Court has recognized, that scheme "enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action." *Fausto*, 484 U.S. at 449.

Rather than relying simply on judicially recognized principles of deference,[2] Congress explicitly limited the

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[2] The Federal Circuit, which has exclusive jurisdiction to review the decisions of the MSPB, has recognized that settled principles governing the deference owed to the policies or rules of federal agencies charged with administering statutory programs apply to the MSPB. See, *e.g.*, *Lovshin* v. *Department of Navy*, 767 F.2d 826, 840 (Fed. Cir. 1985) ("[D]eference is appropriately given to the MSPB's interpretation of the CSRA. Congress has vested the MSPB with substantial responsibility for enforcing the Act."), cert. denied, 475 U.S. 1111 (1986), quoted in *Lachance* v. *Devall*, 178 F.3d 1246, 1254 (Fed. Cir. 1999).

scope of judicial review of MSPB decisions. The Federal Circuit may set aside the Board's decision only if it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. 7703(c). As Congress appreciated when it enacted the CSRA, that scope of review tracks "the traditionally limited appellate review the courts provide agency actions in other areas." S. Rep. No. 969, *supra*, at 52. See, *e.g.*, 5 U.S.C. 706; see also *Motor Vehicle Mfrs. Ass'n of the United States, Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency.").

B. For At Least 19 Years, The MSPB Has Ruled That Federal Agencies May Consider Prior Disciplinary Actions, Even When Such Actions Are Subject To Pending Grievances

In the more than two decades since its creation, the MSPB has developed a significant body of case law in adjudicating disputes under the CSRA. This case involves a challenge to the well-settled MSPB rule that, in disciplining or removing employees pursuant to the CSRA, federal employers may take account of prior disciplinary actions against an employee, even when such actions are subject to pending grievance proceedings.

1. Federal employers and the MSPB have long recognized that an employee's past disciplinary record is an important ingredient in considering the appropriate sanction for subsequent misconduct. In *Douglas* v. *Veterans Administration*, 5 M.S.P.B. 313 (1981), the

MSPB recognized that Congress authorized the Board to review the reasonableness of discipline imposed by agencies and mitigate actions that are "clearly excessive, disproportionate to the sustained charges, or arbitrary, capricious, or unreasonable." Drawing upon a "well developed body of regulatory and case law," the MSPB identified a non-exhaustive list of factors that are "generally recognized as relevant" to the penalty determination, including the "employee's past disciplinary record." *Id.* at 330-332. Both before and after *Douglas*, numerous federal agencies have enacted rules instructing supervisors to consider an employee's prior disciplinary record in assessing subsequent discipline.[3]

Shortly after it decided *Douglas*, the MSPB considered whether an employee may collaterally attack in an MSPB appeal the prior disciplinary record upon which an agency's subsequent penalty is based. *Bolling* v. *Department of the Air Force*, 8 M.S.P.B. 658 (1981). In answering that question, the MSPB looked to the practice followed by the Civil Service Commission. As

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[3] See, *e.g.*, Dep't of Defense Admin. Instruction No. 8, § 6.1.1.1 (Aug. 17, 1981) (In disciplining employee, deciding official should consider, *inter alia*, " * * * previous offenses."); Dep't of Army Reg. No. 690-700, ch. 751, paras. 1-4 ("prior offense *of any type* may form the basis for proposing an enhanced penalty"); Dep't of Air Force Instruction No. 36-704, § F(34) (July 22, 1994) ("Supervisors and managers apply increasingly more severe penalties as the employee continues to breach the employee-employer relationship."); Dep't of Navy, Office of Civilian Personnel Management Instruction No. 12752.1, App. B(2)(b) (Nov. 16, 1989) ("Any past offense may form the basis for proposing a remedy from the next higher range of remedies for a subsequent offense. The offenses need not be identical or similar."). At the same time, however, agency rules or collective bargaining agreements often provide that prior disciplinary actions shall not be considered after a period of reckoning of two or three years. See p. 33, *infra*.

it explained, the Federal Personnel Manual allowed for relatively deferential review of past disciplinary actions when certain procedural safeguards were followed in assessing prior discipline. See *id.* at 658-659 (quoting Federal Personnel Manual, Supp. 752-1, S4-3b(1) ("Reference to past disciplinary record")).

Adopting a similar approach, the MSPB in *Bolling* held that, when the Board reviews a disciplinary action based upon the employee's prior disciplinary record, the prior record is open to review, but the scope of review varies with the procedural protections enjoyed by the employee in the prior disciplinary proceeding. 8 M.S.P.B. at 658-659. In determining the proper scope of review, the MSPB looks to whether the employee received notice of the prior action in writing and had an opportunity to challenge it, and whether the action is a matter of record. *Id.* at 659, 660-661. If one or more of those procedural protections was not observed, the MSPB undertakes "a full, *de novo* review" of the earlier disciplinary action as part of its review of the later disciplinary decision. *Id.* at 659. When all of those procedural protections were afforded, by contrast, the MSPB will credit the agency's reliance on the prior action unless the employee can show, based upon the existing record from the earlier proceeding, that the earlier action was "clearly erroneous." *Id.* at 660-661.

As the MSPB reasoned in *Bolling*, the foregoing analysis "strikes a reasonable and workable balance between the competing interests involved": "an appellant is not allowed to relitigate issues that either were, or could have been, thoroughly litigated previously," but "agencies are not able to utilize clearly erroneous prior actions as aggravating factors so as to enhance the penalties imposed." 8 M.S.P.B. at 660. In the nearly two decades since *Bolling*, the MSPB has

applied that framework in scores of cases—including the instant one, Pet. App. 36a-37a—to decide whether an agency properly relied upon an employee's prior disciplinary record in taking subsequent disciplinary action against that employee. See, *e.g.*, *Holland* v. *Department of Defense*, 83 M.S.P.R. 317, 320-322 (1999); *Crawford* v. *Department of Justice*, 45 M.S.P.R. 234, 236 n.1 (1990) (citing cases).

2. On the heels of *Douglas* and *Bolling*, the MSPB confronted the question presented here: whether, in disciplining or removing an employee, an agency may rely upon prior disciplinary actions that are "the subject of pending grievance or arbitration procedures." *Carr* v. *Department of the Air Force*, 9 M.S.P.B. 714 (1982). The Board answered that question in the affirmative, holding that consideration of a prior action that is subject to a pending grievance is proper under *Douglas*, but that an employee may challenge that action consistent with the framework established by *Bolling*. *Id.* at 715.[4] In the 19 years

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[4] The appellant in *Carr* argued that 5 U.S.C. 7121(e) "divests the Board of appellate jurisdiction over matters grieved under a negotiated grievance procedure." 9 M.S.P.B. at 714. As the Board explained, however, Section 7121(e) only divests the MSPB of jurisdiction over disciplinary actions that are covered by 5 U.S.C. 4303 and 7512 (and thus appealable to the MSPB), and that the employee elects to challenge pursuant to a grievance procedure rather than an MSPB appeal. 9 M.S.P.B. at 714. See 5 U.S.C. 7121(e)(1) (employee may elect to challenge such an action pursuant to "the appellate procedures of [5 U.S.C. 7701] or under the negotiated grievance procedure, but not both"). Thus, where, as in *Carr*, the prior disciplinary action (a one-day suspension) that is the subject of a pending grievance is not appealable to the MSPB in the first place, the MSPB held that nothing in Section 7121(e)(1) prevents the Board from considering the action in reviewing a

since *Carr* was decided, the MSPB repeatedly has affirmed the principle that "an agency may rely on a record of past discipline even where a prior disciplinary action is the subject of a pending grievance." *Freeman* v. *Department of Transp.*, 20 M.S.P.R. 290, 292 (1984).[5]

The MSPB also provides employees with an additional protection. "If the ultimate result of the grievance process is to reverse [an aspect of] the appellant's prior record, he may submit a request that the Board reopen its decision to consider the effect of that determination on the removal penalty." *Morgan* v. *Department of Defense*, 63 M.S.P.R. 58, 62 n.3 (1994). See 5 U.S.C. 7701(e)(1)(B); 5 C.F.R. 1201.117. The Board is receptive to such requests. See, *e.g.*, *Payne* v. *United States Postal Serv.*, 69 M.S.P.R. 503, 508 (1996) (granting motion to reopen MSPB decision and reversing agency's decision to remove employee based on court of appeals decision reversing the criminal conviction on which the agency had relied in removing employee); cf. *Lopez* v. *Department of Justice*, 55 M.S.P.R. 644, 646 (1992) (cancellation of a suspension on which the agency had relied in imposing discipline provided good cause

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subsequent disciplinary action (the employee's removal) that was properly appealed to the MSPB. 5 U.S.C. 7513(d).

[5] Accord, *e.g.*, *Morgan* v. *Department of Defense*, 63 M.S.P.R. 58, 61 (1994); *Taylor* v. *Department of Justice*, 60 M.S.P.R. 686, 689 (1994); *Wilson* v. *Department of Justice*, 58 M.S.P.R. 96, 99 n.2 (1993); *Harrison* v. *Department of the Treasury*, 42 M.S.P.R. 614, 622 (1989); *Delgado* v. *Department of the Air Force*, 36 M.S.P.R. 685, 689 (1988); *Ballew* v. *Department of Army*, 36 M.S.P.R. 400, 403 (1988); *Rewald* v. *United States Postal Serv.*, 34 M.S.P.R. 13, 16 (1987); *Hubbard* v. *United States Postal Serv.*, 32 M.S.P.R. 505, 508 (1987); *Boyd* v. *Veterans Admin.*, 20 M.S.P.R. 672, 675 n.2 (1984); *Ramseur* v. *Department of the Navy*, 16 M.S.P.R. 104, 106 (1983).

for filing untimely MSPB appeal and warranted reversal of the subsequent penalty); *Jones* v. *Department of Air Force*, 24 M.S.P.R. 429, 431 (1984) (removal found to be unreasonable when a prior disciplinary action on which the agency had relied in removing employee "was reversed by grievance").

3. The MSPB followed the longstanding administrative practice developed in *Douglas*, *Bolling*, and *Carr* in this case. First, the administrative judge found "that the agency conscientiously considered the *Douglas* factors," and properly considered "[respondent]'s recent, prior disciplinary actions." Pet. App. 36a. Second, the administrative judge concluded that, "[b]ecause those prior disciplinary actions were in writing, made a matter of record, and the [respondent] had the opportunity to grieve them, the Board's review of a prior disciplinary action is limited to determining whether that action is clearly erroneous." *Id.* at 37a (citing *Bolling*, 8 M.S.P.B. at 659-660). Although respondent (who was represented by counsel before the MSPB) was notified by the prehearing order "that she could present argument concerning whether the prior actions were clearly erroneous," she declined to present such an argument. *Ibid.* Nonetheless, the administrative judge "reviewed the record of the prior disciplinary actions," and concluded that there was no clear error. *Ibid.*

The arbitrator's decision vacating the first disciplinary action—the May 1997 letter of warning for insubordination—was issued while respondent's case was still pending before the full MSPB. Respondent, however, did not avail herself of her right to supplement the record and bring that new evidence to the Board's attention. 5 C.F.R. 1201.115(d). Nor, after the MSPB had issued its final decision in this case, did

respondent avail herself of the procedure available under *Morgan* and ask the Board to reopen its decision and reconsider it in light of the intervening arbitrator's decision. 5 C.F.R. 1201.117.

C. The MSPB's Rule Allowing The Consideration Of Prior Disciplinary Actions That Are Subject To Pending Grievances Promotes Government Efficiency, While Protecting Legitimate Employee Rights

The MSPB's longstanding rule permitting federal agencies to consider prior disciplinary actions that are subject to pending grievances promotes government efficiency and the merit principles, while providing aggrieved employees with more than adequate process to challenge adverse agency actions based on such actions.

1. The MSPB's rule is "faithful to the central congressional purposes underlying the enactment of the CSRA," *Cornelius* v. *Nutt*, 472 U.S. 648, 662 (1985) (internal quotation marks omitted), including the goal of "promot[ing] the efficiency of the service," 5 U.S.C. 7513(a). As discussed pp. 2, 15-16, *supra*, Congress enacted the CSRA against the backdrop of widespread concern that the civil service system had "too often become the refuge of the incompetent employee." S. Rep. No. 969, *supra*, at 3. To address that concern, Congress gave "agencies greater ability to remove or discipline expeditiously employees who engage in misconduct," and thus promote the efficiency of the service. *Nutt*, 472 U.S. at 662-663. Allowing agencies to consider an employee's prior disciplinary record in calibrating the penalty for subsequent misconduct—even when such prior actions are subject to pending grievances or other proceedings—directly promotes that objective.

An employee's recent disciplinary record is one of the most relevant factors that employers (public or private) routinely consider in deciding what discipline is appropriate. That record may establish a pattern or practice of misconduct on the part of an employee necessitating more serious disciplinary measures than might be warranted by the latest infraction alone.[6] Conversely, even when a more severe discipline might be warranted in response to a single infraction, an employer might decide to impose a lesser penalty and wait and see if the misconduct ceases. That approach—commonly known in labor relations as "progressive discipline"—benefits employees by providing them with notice of workplace deficiencies and an opportunity to correct them, and benefits employers by enabling them to target employees who have demonstrated an inability or unwillingness to improve their performance. Cf. *Norfolk Shipbuilding & Drydock Corp.* v. *Local No. 684*, 671 F.2d 797, 799 (4th Cir. 1982).[7] On the other

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[6] Severe discipline or removal may be particularly warranted when an employee engages in a pattern or practice of sexual harassment or similar wrongdoing. In many cases, no single instance of misconduct would justify a lengthy suspension or removal, even though the totality of misconduct often warrants such action. Cf. *Meritor Sav. Bank* v. *Vinson*, 477 U.S. 57, 67 (1986); *King* v. *Hillen*, 21 F.3d 1572, 1580-1581 (Fed. Cir. 1994).

[7] It is commonplace for private-sector employers to consider an employee's prior disciplinary record in responding to continuing misconduct and engage in a practice of progressive discipline. See, *e.g.*, Pamela Fagan, *Do You Investigate Employee Complaints the Right Way?*, 77 Human Resources Focus 1011 (2000) (noting that employers should consider "prior misconduct" and "prior discipline" in deciding what level of discipline to impose for subsequent misconduct); Paul Falcone, *A Blueprint for Progressive Discipline and Terminations*, 77 Human Resources Focus 35 (2000) (advising supervisors to keep records of "bad * * * behavior" and not to

hand, if an agency is told that it cannot rely on the employee's prior record in disciplining her for subsequent misconduct, then the agency might feel compelled to impose the most serious sanction available in the first instance.

Consideration of an employee's prior disciplinary record not only makes sense as a matter of basic human resources management, but also comports with the text of the CSRA. As discussed p. 16, *supra*, the CSRA established merit system principles to govern federal personnel management, which include the principle that "inadequate [employee] performance should be corrected," and that "employees should be separated who cannot or will not improve their performance to meet required standards." 5 U.S.C. 2301(b)(6). Permitting federal agencies to take graduated or accelerated

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remove disciplinary information from an employee's file because such information is often considered in determining the level of discipline for future misconduct). Studies confirm the sensible practice that supervisors are "predisposed to harsher disciplinary responses toward employees with a record of frequent absence." Patricia A. Simpson & Joseph J. Martocchio, *The Influence of Work History Factors on Arbitration Outcomes*, 50 Indus. & Lab. Rel. Rev. 252, 255 (1997) (citing Joseph J. Martocchio & Timothy A. Judge, *When We Don't See Eye to Eye: Discrepancies Between Supervisors and Subordinates in Absence Disciplinary Decisions*, 21 J. Mgmt. 251-278 (1995)). Likewise, prior disciplinary action is often considered in reviewing employment decisions. It is taken into account in internal grievance hearings, and has proved to be a significant factor in such proceedings. See Simpson & Martocchio, *supra*, at 255 ("[T]he number of times an employee was disciplined in the two years prior to the filing of a grievance has been shown to be negatively correlated with a favorable resolution of the grievance on the employee's behalf at higher steps of the internal grievance apparatus.") (citing Brian S. Klaas, *Managerial Decision Making About Employee Grievances: The Impact of the Grievant's Work History*, 42 Personnel Psych. 52, 52-68 (1989)).

disciplinary measures against employees on the basis of their prior disciplinary actions—even if such actions are subject to pending grievances—protects those principles. It gives employees a chance to correct deficiencies or mistakes and allows employers to separate employees "who cannot or will not improve their performance to meet required standards."

2. At the same time, the MSPB's rule governing the consideration of prior disciplinary actions provides employees with ample procedural protections and accords with the CSRA's objective of protecting legitimate employee rights. As this Court has recognized, the CSRA's notice and hearing requirements establish an "elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative and judicial—by which improper action may be redressed." *Bush* v. *Lucas*, 462 U.S. 367, 385 (1983). See *Lachance* v. *Erickson*, 522 U.S. 262, 265-266 (1998) (discussing the "carefully delineated [procedural] rights" established by the CSRA); see also 5 U.S.C. 7503, 7513 (entitling covered employees to notice, opportunity to be heard, an attorney, and a written decision prior to any suspension, removal, or other serious adverse action); 5 U.S.C. 7513(d), 7701 (providing for administrative and judicial review of major adverse actions).[8]

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[8] The negotiated grievance provision (5 U.S.C. 7121) provides covered employees with an additional process to challenge adverse actions under the CSRA, even with respect to minor disciplinary actions that do not trigger the procedural protections set forth in 5 U.S.C. 7503 and 7513. Cf. *Winston* v. *United States Postal Serv.*, 585 F.2d 198, 210 (7th Cir. 1978) ("[W]e hold that the grievance procedures adopted for nonpreference-eligible postal employees by [Postal Service] and the Union do not violate the due process clause of the Fifth Amendment.").

The *Bolling* rule governing the consideration of prior disciplinary actions ensures that the employee does not lose the protections that accompany adverse action by agency reliance on prior minor discipline unaccompanied by such protections. As discussed above, the *Bolling* framework allows collateral challenges to prior discipline. That fully and fairly protects employees' interests. Furthermore, if a prior disciplinary action is set aside as the result of a successful grievance after an initial decision has been issued by the MSPB, the MSPB's rules permit the employee to petition the full Board to review the initial decision in light of the new evidence. 5 C.F.R. 1201.115(d)(1); cf. *Morgan*, 63 M.S.P.R. at 62 n.3. And the MSPB may reopen any final decision—"at any time"—in the event that the employee's prior disciplinary record has been revised as the result of a successful grievance. 5 C.F.R. 1201.118. The ability to reopen MSPB decisions might well prove sufficient standing alone to protect employees, but when coupled with the *Bolling* rule it provides employees with more than adequate procedural safeguards.

3. The MSPB's longstanding rule concerning disciplinary actions that are subject to pending grievances embodies the Board's judgment that allowing federal agencies to consider such prior actions in disciplining or removing employees promotes the objectives of the CSRA and is otherwise in accordance with law. Cf. *Atchison, T. & S.F. R.R.* v. *Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (plurality opinion) ("A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress."). OPM, the agency charged with overseeing federal personnel management matters, has not challenged MSPB's decisions implementing that rule. See 5 U.S.C. 7703(d) (OPM

may seek judicial review of any MSPB decision that, in OPM's "discretion," erroneously "interpret[s] a civil service law, rule, or regulation affecting personnel management"). Respondent accordingly bears an extremely heavy burden in establishing that a court should substitute its judgment for that of the agency.

D. The Court Of Appeals Erred In Holding That The MSPB Abused Its Discretion By Evaluating Respondent's Removal In Accordance With The Longstanding Administrative Rule

With scarcely any discussion of the foregoing considerations, and without even requesting oral argument, the Federal Circuit in this case overturned the MSPB's longstanding treatment of prior disciplinary actions that are subject to pending grievances, and effectively put an end to a time-honored federal personnel management practice. As we explain below, the Federal Circuit's ruling is without precedent or principle and should be set aside.

1. To begin with, the Federal Circuit fundamentally misconceived its limited scope of review under the CSRA. The court of appeals may only substitute its judgment for that of the MSPB when the agency's position is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 7703(c)(1).[9] As this Court has recognized in the APA context, "[t]he scope of review under the 'arbitrary and

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[9] The Federal Circuit may also set aside a MSPB decision if it is "obtained without procedures required by law, rule, or regulation having been followed," or "unsupported by substantial evidence." 5 U.S.C. 7703(c). But neither of those provisos is implicated by the question presented in this case and the Federal Circuit specifically grounded its ruling on its conclusion that the MSPB had "abused its discretion." Pet. App. 7a.

capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43. Accord *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 803 (1978). With virtually no explanation for doing so, the court of appeals in this case substituted its judgment for that of the MSPB and numerous federal employers with respect to whether agencies may consider prior disciplinary actions that are subject to pending grievances, and overturned nearly two-decades worth of administrative precedent. That was error.

The Federal Circuit provided no basis to dismiss the longstanding administrative practice as arbitrary and capricious. The court identified no constitutional provision, statute, or regulation that calls into question the *Bolling* regime or the routine practice of federal employers to consider an employee's prior disciplinary record without regard to whether grievances are pending. Instead, the Federal Circuit relied on a flawed syllogism. First, the court stated that there can "be no doubt that a penalty determination cannot be supported by an earlier prior disciplinary action that is subsequently reversed." Pet. App. 6a. Second, the court noted that, if an agency relies on prior disciplinary actions as to which a grievance is pending and the grievance is sustained, "the foundation of" the employer's and the reviewing MSPB's "analysis would be compromised." *Id.* at 7a. From those premises, the court concluded: "Accordingly, we hold that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits. To conclude otherwise would risk harming the legitimacy of the reasonable penalty analysis, by allowing the use of

unreliable evidence (the ongoing prior disciplinary actions) to support an agency action." *Ibid.*

But the Federal Circuit's conclusion does not follow from its premises. The fact that reliance on prior disciplinary actions for which grievances are pending creates a risk that the outcome of the grievances will undermine the decisions of the federal agencies and the MSPB does not justify requiring agencies to *ignore* prior actions entirely during the often lengthy period it takes to process grievances, especially when a mechanism exists to address that risk. The *Bolling* framework greatly minimizes the risk of "compromised" decisions by allowing for a collateral attack on prior decisions. Moreover, the ability to reopen MSPB decisions when the outcome of a grievance undermines an MSPB decision eliminates any unfairness when the possibility that concerned the Federal Circuit in fact comes to pass. Those procedural rules eliminate the potential unfairness that concerned the court below, without precluding the MSPB and every federal employer from reviewing highly relevant evidence.

In the end, the Federal Circuit appeared to prefer a disciplinary scheme that forbids reference to prior discipline subject to grievance, in order to eliminate any possibility that the outcome of a grievance would cast doubt on later discipline. Federal employers and the MSPB traditionally have preferred a different scheme, one in which federal agencies—like private-sector employers—may consider prior discipline subject to grievance, but in which employees are afforded substantial procedural protections to prevent prejudice in the event that a prior action is set aside as the result of a grievance or other proceeding. In our view, MSPB and federal agencies have adopted a far superior policy, but that was not the question before the Federal

Circuit, and it is not the question before this Court. Having failed to identify anything arbitrary and capricious about the longstanding administrative practice, the Federal Circuit simply had no basis to invalidate it.[10]

2. Certainly nothing in the CSRA precludes an agency from considering prior disciplinary actions that are subject to pending grievances in disciplining or removing an employee. To the contrary, requiring agencies to disregard prior disciplinary actions that remain subject to "proceedings challenging their merits" (Pet. App. 7a) would frustrate the statutory goals of promoting efficiency, allowing employees to correct mistakes, and separating employees who cannot or do not meet required standards.

The Federal Circuit itself acknowledged that "[t]here is no doubt that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given circumstances." Pet. App. 6a. Nonetheless, the Federal Circuit's rule precludes agencies from relying on highly relevant evidence of an employee's efficiency and ties the hands of federal agencies in dealing with perhaps the most troublesome class of employees—recidivists. A recidivist employee (or a union) could prevent an employer

[10] The Federal Circuit's decision had the effect of invalidating not only the longstanding MSPB practice of reviewing disciplinary actions based on prior actions subject to pending grievances, but also the practice of numerous federal employers of looking to an employee's prior record without regard to whether prior discipline is subject to a grievance. Accordingly, the Federal Circuit wiped out the MSPB's administrative regime and the substantive employment polices of numerous federal agencies in one fell swoop, with scarcely any deference at all to the views of MSPB or the employing agencies.

from considering the employee's recent misconduct simply by grieving prior disciplinary actions. Thus, for example, if pending grievances precluded an agency from taking account of an employee's disciplinary record of workplace harassment, then the agency could not sanction a second, third, or tenth incident more severely than the first. Even if part of a pattern of continuing misconduct, the most recent charge would have to be considered in a vacuum as long as the prior acts remained subject to pending grievances. Government efficiency and effectiveness—not to mention the rights of others in the workplace—would suffer enormously under such a regime.

It is no answer to argue that employers can still rely on the aspects of a prior disciplinary record not subject to pending grievances. If agencies cannot consider prior disciplinary actions while a grievance is pending, they may not be able to consider such prior actions at all. Federal personnel regulations and collective bargaining agreements commonly prevent agencies from considering prior disciplinary actions that are more than two or three years old. The Postal Service's collective bargaining agreement provides that "records of a disciplinary action against an employee shall not be considered in any subsequent disciplinary action if there has been no disciplinary action initiated against the employee for a period of two years." Agreement Between United States Postal Service and National Ass'n of Letter Carriers, AFL-CIO (1994-1998) art. 16:10. Similarly, Department of Defense Administrative Instruction No. 8 (Aug. 17, 1981) provides for consideration of past suspensions only if they occurred within the last three years, and of past reprimands and admonishments only if they occurred within the last two years. If recent disciplinary actions are excluded

because of pending grievance procedures, and less recent ones are excluded because they are considered stale, the basis for progressive discipline will be eliminated. Moreover, even if the Federal Circuit's rule would allow some window in which past disciplinary actions could be considered, the rule clearly puts the most recent, and therefore most relevant, actions off limits as long as a grievance is pending.

Those problems are particularly acute because the inherent informality of grievance proceedings invites delay. Grievance proceedings initiated under the CSRA —which often include arbitration—are not immune from such delay. Cf. *Clark* v. *Bear Stearns & Co.*, 966 F.2d 1318, 1319 (9th Cir. 1992) ("Arbitration provides a speedy and efficient method for the resolution of disputes. At least that is the theory. In practice, a dispute submitted for arbitration often drones on.") (footnote omitted). In this case, for example, the grievance challenging respondent's May 1997 infraction was not final until July 1999—two years after the infraction. Pet. App. 5a. Respondent's grievances challenging the June 1997 and August 1997 suspensions are still pending after more than three years. Respondent herself acknowledges that "the grievance process no doubt sometimes experiences delay." Br. in Opp. 17. The Federal Circuit rule will only exacerbate matters by giving employees a clear incentive to delay proceedings. Indeed, as far as its effect on future discipline is concerned, a pending grievance is as effective as a successful grievance.[11] As a result, by the time the

[11] Of course, we recognize that the grievance procedure plays a salutary role in allowing employers and employees to resolve legitimate disputes. In pursuing good faith disputes, employees have little incentive to delay and every incentive to obtain a just result expeditiously. The problem with the Federal Circuit rule is that it creates an incentive for foot dragging in precisely the cases in which the grievance is filed to insulate a disciplinary action from use in subsequent disciplinary actions.

grievance is resolved, the prior action may be stale and in some cases no longer subject to consideration under agency rules or agreements.

In the wake of its decision in this case, the Federal Circuit itself has recognized the practical effect of "the rule announced in *Gregory*." *Blank* v. *Department of the Army*, No. 00-3255, 2001 WL 392069, at *5 (Apr. 19, 2001). Relying on the court of appeals' decision in this case, the aggrieved employee in *Blank* argued that the MSPB improperly considered his prior disciplinary record in affirming the agency's decision of removal because prior disciplinary actions against him remained subject to pending EEOC proceedings. The Federal Circuit disagreed. As the court explained, "EEOC appeals often take years to complete." *Ibid.* Thus, "[i]f an agency is unable to consider prior disciplinary actions pending before the EEOC, the agency would be effectively prohibited from timely implementing progressive disciplinary measures." *Ibid.* We agree. However, the same problematic results follow if an agency is unable to consider prior actions that are subject to pending grievances, which—as this case itself illustrates—also can take years to complete.[12]

[12] In *Blank*, the Federal Circuit purported to distinguish EEOC proceedings from grievance proceedings on the ground that "an EEOC complaint is not an attack on the validity of the disciplinary action itself." 2001 WL 392069, at *5. But the CSRA explicitly provides that a disciplinary action must be set aside if it is based on a prohibited practice such as discrimination. 5 U.S.C. 7701(c)(2)(B). And, indeed, respondent in this case specifically challenged her removal on the ground that it was motivated by

The incentives created by the Federal Circuit's rule also would undermine the efficiency of the system established by the CSRA for reviewing agency action. Immunizing employees from cumulative discipline based on prior disciplinary actions for as long as such actions remain subject to challenge would encourage recidivist employees (or their unions) to file grievances against virtually *any* disciplinary action, even minor ones, and to prolong such proceedings for as long as possible (or at least until the reckoning period in the agency's rules or a collective bargaining agreement has expired), in order to bar an agency from relying on prior misconduct in dealing with subsequent misconduct. The added burdens imposed on the system by such proceedings could interfere with the legitimate rights of employees who have been wrongfully aggrieved by major adverse agency action by creating a backlog of cases that would hamper their ability to obtain redress.

More fundamentally, the Federal Circuit's rule flouts the presumption of regularity traditionally afforded agency action. The time-honored presumption is that administrative officials perform their duties properly and in good faith. See *United States* v. *Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926) ("[I]n the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties."); *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996); accord *United States* v. *Mezzanatto*, 513 U.S. 196, 210 (1995); *Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 101 (1949); see also *FTC* v. *Invention Submission*

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illegal discrimination. Pet. App. 30a-32a. Moreover, employees can and do present allegations of discrimination in grievance proceedings challenging adverse actions. See 5 U.S.C. 7121(d).

Corp., 965 F.2d 1086, 1091 (D.C. Cir. 1992) ("As we have so often said, 'agencies are entitled to a presumption of administrative regularity and good faith.'"), cert. denied, 507 U.S. 910 (1993); *Hubbard* v. *United States Postal Serv.*, 32 M.S.P.R. 505, 508 (1987) (agency action enjoys "the presumption of honesty and integrity which accompanies administrative adjudicators").

There is no reason to treat differently an agency's decision to take a particular disciplinary action against an employee, especially when that action is preceded by notice and an opportunity to be heard. Cf. *Miguel* v. *Department of the Army*, 727 F.2d 1081, 1083 (Fed. Cir. 1984) ("It is a well-established rule of civil service law that the penalty for employee misconduct is left to the sound discretion of the agency.") (citing cases). Yet the Federal Circuit's rule effectively reverses the presumption of regularity in the case of any prior disciplinary action that is subject to a pending grievance; and requires the MSPB and federal agencies to presume that such an action is "unreliable" (Pet. App. 7a) until the grievance is shown to have failed.

3. Nor is the Federal Circuit's rule compelled by principles of due process. See *Gilbert* v. *Homar*, 520 U.S. 924, 928-929 (1997) (discussing due process requirements applicable to suspension and removal of public employees); *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 545-546 (1985). The elaborate procedures established by the CSRA and the MSPB—including the *Bolling* rule and reopening procedure—provide employees more than sufficient process to satisfy any constitutional or statutory command. As explained pp. 2-4, 20-23, *supra*, employees enjoy several different layers of procedural protections that enable them to challenge adverse agency actions under the CSRA. Standing alone, the *Bolling* framework or

reopening mechanism might satisfy any lack-of-sufficient-process objection, but when considered together, they plainly afford aggrieved employees more than adequate process to challenge adverse actions.

Respondent, moreover, is hardly in a position to argue that she is entitled to *more* process, when she has not even fully availed herself of the procedures that are in place. As discussed above, respondent did not bring the arbitrator's decision to the attention of the full Board while her appeal was still pending before it, 5 C.F.R. 1201.115(d)(1), and she has not asked the Board to reopen her case, 5 C.F.R. 1201.118.

4. Because the Federal Circuit erred in holding that "consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits," Pet. App. 7a, the judgment of the court of appeals should be reversed and the case remanded for further proceedings. The Federal Circuit predicated its decision on the conclusion that the Board (and the Postal Service) improperly relied upon respondent's prior disciplinary actions—including both the action set aside by the arbitrator and the actions that remain subject to pending grievances—in determining the reasonableness of respondent's removal, because those actions "were the subject of ongoing grievance proceedings." *Ibid.*; see *id.* at 1a-2a. The Federal Circuit erroneously refused to allow agencies to look to any prior disciplinary action subject to a grievance, but a remand remains necessary to permit the court to consider the effect of the arbitrator's invalidation of one prior action.

In its petition for rehearing in the court of appeals, the Postal Service suggested that the court should "remand this action to the MSPB to determine the issue of the appropriate penalty, with instructions that the board may not consider the one prior disciplinary action that was overturned by the arbitrator." Gov't C.A. Pet. for Reh'g 20. Alternatively, the court of appeals could also determine that such a remand is unnecessary or inappropriate, and that respondent's proper remedy lies in directly asking the MSPB to reopen the decision in her case. Respondent never placed the arbitrator's decision overturning the first disciplinary action into the MSPB record, even though that decision was issued months before the MSPB issued its final decision. The Federal Circuit took "judicial notice" of the arbitrator's decision, Pet. App. 5a, but the CSRA expressly limits the Federal Circuit's review of MSPB decisions to "the record." 5 U.S.C. 7703(c). Cf. *Fisher* v. *INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc) (where petitioner could have put evidence into administrative record but did not, court of appeals could not take judicial notice of evidence because its review was limited by statute to the administrative record). Accordingly, the proper course may be for the Federal Circuit to resolve this appeal against respondent and for respondent to file a motion to reopen directly with the MSPB.[13] In either

[13] Moreover, even considering the arbitrator's decision expunging the *first* disciplinary action, respondent's removal may still be supported by substantial evidence. 5 U.S.C. 7703(c)(3). As discussed, in upholding the Postal Service's decision to remove respondent, the MSPB did not place any particular reliance on the May 1997 letter of warning expunged by the arbitrator. Instead, the Board emphasized that respondent's prior disciplinary record "involved unauthorized overtime," a reference to the misconduct resulting in respondent's August 1997 suspension. Pet. App. 37a. See *id.* at 37a-38a ("At first blush, a removal for one instance of failure to perform duties satisfactorily may appear unreasonable. However, *considering the [respondent's] prior disciplinary actions also involved unauthorized overtime*, that one instance takes on additional significance and tends to reveal a pattern of conduct

event, we believe that the propriety of a remand to the MSPB may be left for the Federal Circuit on remand.

* * * * *

For nearly two decades, the MSPB has recognized that federal agencies may consider an employee's disciplinary record in calibrating the discipline for subsequent misconduct without regard to whether prior discipline remains subject to pending grievances. That common sense practice is deeply entrenched in the Board's decisions and advances the CSRA's objectives of promoting government efficiency, providing employees the opportunity to correct mistakes, and enabling employers to separate employees who cannot or do not improve. At the same time, the MSPB has afforded employees significant procedural protections in challenging adverse agency action that is based on prior disciplinary actions. The Federal Circuit in this case improperly substituted its judgment for the MSPB's and overturned that longstanding rule. The Federal Circuit's ill-considered decision effectively prevents federal employers from using the most relevant aspects of an employee's disciplinary record in sanctioning misconduct. It amounts to an unwarranted incursion into the sensitive area of federal employer-employee relations, raises the same sort of concerns

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by the appellant to disregard the agency's and her supervisor's expectations of her performance and conduct.") (emphasis added). *Jones* v. *Department of Air Force*, is not to the contrary. There, the MSPB held that the appellant's removal was unreasonable, because a prior disciplinary action on which the agency had relied "was reversed by grievance." 24 M.S.P.R. at 431. But once that prior action was "effectively cancelled" by the successful grievance, there was little, if anything, in the appellant's prior disciplinary record in *Jones* to justify the removal. *Ibid.*

that led to the enactment of the CSRA, and should be reversed by this Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

MARIA A. GREGORY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Merit Systems Protection Board, in reviewing the lawfulness of a decision by the Postal Service to remove an employee from employment, may rely on prior disciplinary actions that are still the subject of pending grievance proceedings.

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IN THE

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No. 00-758

UNITED STATES POSTAL SERVICE,
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v.

MARIA A. GREGORY,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

BRIEF FOR RESPONDENT

The Postal Service has devoted the entirety of its opening brief to challenging a broad rule under which not only the Merit Systems Protection Board ("MSPB") but also all federal employers are prohibited from relying on prior disciplinary actions that are still the subject of pending grievance proceedings. This is remarkable because, as respondent explained at the certiorari stage, there is no reason to believe that the court below embraced that broad rule. And respondent has no occasion to defend that broad rule, for she prevails under the rule that the court of appeals did adopt: a narrow rule prohibiting *the MSPB* from relying on prior disciplinary actions that are still the subject of pending grievance proceedings. That narrow rule requires agencies to make a choice between forgoing reliance on unarbitrated prior

disciplinary actions and postponing MSPB proceedings until arbitration proceedings are completed.

The narrow rule, which the Postal Service's brief does not challenge, is unquestionably correct and has long been applied in the grievance arbitration context. It prevents an agency from doing what the Postal Service attempted here: to bootstrap its way to victory by first obtaining affirmance of the grievant's termination in reliance on unarbitrated disciplinary actions and then turning around to end the pending arbitrations — on the theory that the grievant is no longer an employee and therefore not entitled to pursue grievances. The narrow rule is also entirely consistent with the larger framework of MSPB decisional law.

This Court should therefore affirm the court of appeals' judgment on the basis of the narrow rule. Even if the Court were to reject the narrow rule, it should at least leave undisturbed the aspect of the court of appeals' decision holding that respondent's removal cannot stand in light of the arbitral decision overturning one of the three prior disciplinary actions in respondent's record. In a brief filed below, the Postal Service expressly and correctly conceded that this aspect had been properly decided. There is no reason to allow the Postal Service to turn its back on that representation now.

An even more appropriate disposition would be to dismiss the writ of certiorari as improvidently granted. *First*, given that the Postal Service attacks only a broad rule that is not implicated and ignores a narrow rule that fully supports the judgment below, this case simply does not provide a proper setting to evaluate either rule. *Second*, the Postal Service waived its right to challenge either the broad or the narrow rule by failing to address the merits of either rule in its brief in the court of appeals. *Finally*, now that an arbitrator has set

aside one of respondent's three prior disciplinary actions, a new penalty decision must be made without regard to that action. It is implausible that the new decision will again call for respondent's termination. Thus, whether this Court embraces or rejects either the broad or the narrow rule is of only academic significance to this case.

STATEMENT

1. This case involves an issue of labor relations in the Postal Service. Postal employees have organizational and bargaining rights similar to those of employees in the private sector. *See* 39 U.S.C. § 1209. That is so because the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970), "established the Postal Service as an independent establishment of the executive branch with very limited application of federal employee law." *Bacashihua v. MSPB*, 811 F.2d 1498, 1501 (Fed. Cir. 1987); *see* 39 U.S.C. §§ 201, 1005. The Postal Service therefore must engage in collective bargaining with unions representing its employees. *See id.* §§ 1203, 1206. Respondent is a member of the National Association of Letter Carriers, whose collective bargaining agreement with the Postal Service governed the terms of her employment. *See* Agreement Between National Association of Letter Carriers, AFL-CIO, and U.S. Postal Service (1998-2001), *available at* http://www.nalc.org/cau/index.html ("Agreement").

The majority of Postal Service employees are not within the scope of most of the provisions of the Civil Service Reform Act of 1978 ("CSRA"). *See* 39 U.S.C. § 410(a); *see also* 5 U.S.C. § 2105(e). So-called "preference eligible" Postal Service employees — veterans and their dependents, *see* 5 U.S.C. § 2108(3) — share some of the rights of civil servants. *See* 39 U.S.C. § 1005(a)(2); 5 U.S.C. § 7511(a)(1)(B)(ii); *see generally Gribcheck v. United States*

Postal Service, 87 M.S.P.R. 473, 477-81 (2001). Respondent is a preference-eligible employee by virtue of her Army service in the early 1970s. *See* Informal Brief of Petitioner Maria A. Gregory, Att. P-4, *Gregory v. United States Postal Service*, No. 00-3123 (Fed. Cir. filed Feb. 8, 2000) ("Respondent's Fed. Cir. Br.").

Under both the applicable collective bargaining agreement and (where applicable) the CSRA, the Postal Service may terminate employees only if it can sustain its burden of proving that there is just cause. Agreement Art. 16.1; 5 U.S.C. § 7513(a). That principle prohibits removal on the basis of minor infractions, *see* Postal Service Br. 25 n.6, but may still permit removal on the basis of "progressive discipline" — *i.e.*, where the employer can show that, despite escalating prior disciplines intended to correct the employee's behavior, the employee has continued to engage in improper conduct, *see id.* at 25-26 & n.7; *see also* Agreement Art. 16.1; *id.* at 193.

When the Postal Service imposes discipline, the union can challenge it through the collective bargaining agreement's grievance process. *See* 39 U.S.C. § 1206(b); *Cornelius v. Nutt*, 472 U.S. 648, 650, 652 (1985). As is common in such agreements, the collective bargaining agreement here involved calls for a multi-step process. Steps 1, 2, and 3 permit informal appeals to, respectively, a supervisor, the local postmaster, and a regional labor-relations official. *See* Agreement Art. 15.2. In these informal appeals, the parties are expected to (and often do) resolve disputes amicably, by compromising on a lesser charge or penalty.[1] Where the

[1] *See* Agreement Art. 15.3.A ("The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.").

parties cannot reach such a settlement, the union is entitled to appeal the Step 3 decision to an impartial arbitrator, whose decision is final and binding. *See id.* Art. 15.4.[2]

The majority of disciplinary actions against Postal Service employees can be challenged only through the grievance process outlined above. *See, e.g., Mays v. United States Postal Service*, 995 F.2d 1056, 1057 (Fed. Cir. 1993); *Royals v. Tisch*, 864 F.2d 1565, 1567 (11th Cir. 1989); *Winston v. United States Postal Service*, 585 F.2d 198, 202 (7th Cir. 1978). Preference-eligible employees, however, have an alternative remedy, at least where the disciplinary action consists of removal or a suspension of more than 14 days. *See* 5 U.S.C. § 7512. In such cases, they may — instead of appealing to arbitration — appeal the disciplinary action to the MSPB. *See id.* §§ 7511(a)(1), 7513(d); JA 28-29; Agreement Art. 16.9. That Board reviews agency disciplinary actions to ensure that they are "supported by a preponderance of the evidence" and "in accordance with law." 5 U.S.C. § 7701(c)(1)(B) and (2)(C).

2. Respondent Maria Gregory began her postal career in 1985, when she accepted a clerical position at the post office in Hinesville, Georgia. *See* MSPB Transcript ("Tr.") 468-69. Respondent became a part-time letter carrier in 1987 and was promoted to full-time regular letter carrier in 1993. *See* Tr. 470. In 1995, respondent was again promoted to Letter Technician T-6, a position above regular letter carrier in

[2] Whereas arbitration decisions reviewing the disciplinary actions of certain other federal agencies are subject to further judicial or FLRA review, *see Cornelius*, 472 U.S. at 656; 5 U.S.C. §§ 7121(f), 7122, that is not true in the postal context, *see Fuentes v. United States Postal Service*, 54 M.S.P.R. 4, 7 (1992); *see generally Hall v. United States Postal Service*, 26 M.S.P.R. 233, 235-36 (1985).

which she was responsible for overseeing five mail routes and delivering the mail when one of the regularly assigned carriers was unavailable. *See* Pet. App. 15a, 21a, 38a. Respondent simultaneously rose to the rank of shop steward in the local letter carriers' union. *See* Tr. 452. Respondent was known as a model employee. Even the postmaster who ultimately fired respondent acknowledged that, throughout her employ, she had "done a very good job." Tr. 287. A postmaster who had previously supervised her testified that respondent was "one of the best employees she ever had." Pet. App. 39a.

Things changed in 1995. At that time, respondent was sexually harassed by a co-worker. *See* Tr. 474. When respondent complained to her superiors, they were unwilling to do anything more than give the co-worker a slap on the wrist. In addition, shortly thereafter, management prohibited respondent from talking to other letter carriers, supposedly to prevent further incidents. *See* Tr. 478-80. Respondent then filed complaints with the Equal Employment Opportunity Commission and other authorities, which further caused relations with her supervisors to become strained. *See* Tr. 477-81. By early 1997, the Hinesville postmaster was looking for ways "to get rid of her." *See* Tr. 437-39, 446. In the following months, respondent — who had never been disciplined before, *see* Tr. 476 — was subjected to a quick succession of disciplinary actions for minor infractions.

The first incident took place on April 7, 1997, when respondent left work early to take her ill daughter to the doctor. *See* Tr. 486. Although respondent believed that she had received permission to go, her supervisor charged her with insubordination and imposed a 7-day suspension. *See* JA 47-48. After a grievance was filed, the Postal Service reduced the penalty to a letter of warning. *See* JA 43-44. Despite the reduced penalty, respondent's union continued to

grieve the disciplinary action. *See* JA 36-37. Eventually, this would result in the discipline's invalidation by an arbitrator who concluded that respondent was justified in believing that she had permission to leave. *See infra*, p.11; JA 3-16.

A second incident took place on April 18, 1997, when a small bundle of mail that had been misplaced earlier in the day turned up in respondent's truck at the end of her route. *See* JA 45-46. When respondent reported this to a supervisor, she was told to leave it for delivery by another carrier the next day. Nevertheless, management later charged respondent with intentionally delaying the mail and suspended her for 14 days. *See* JA 45. After a grievance was filed, the Postal Service reduced the penalty to a 7-day suspension. *See* JA 41-42. A further grievance appeal did not resolve the dispute. *See* JA 20-21. The union requested arbitration, but the Postal Service refused to proceed on the theory that, after respondent was later terminated, she was no longer entitled to the benefit of the grievance arbitration process. *See infra*, p.12.

Third, respondent was disciplined for various incidents occurring in July 1997, including allegedly earning overtime without first submitting an overtime-request form (described more fully below). *See* JA 38-40. Respondent's supervisors suspended her for 14 days. *See* JA 38. Further grievance appeals did not result in an amicable resolution. *See* JA 34-35; JA 22-23. The union later appealed the matter to an arbitrator, but the Postal Service again refused to proceed. *See infra*, p.12.

3. A fourth and final incident (which would result in respondent's termination) occurred on September 13, 1997. When letter carriers at the beginning of their work day expect that they will need more time than their usual shift to deliver their route, they are to submit to their supervisor a paper slip

(a so-called "Form 3996") requesting either overtime or help from other carriers. *See* Pet. App. 16a; United States Postal Service, *City Delivery Carriers Duties and Responsibilities (Handbook M-41)* at 43-46 (Mar. 1998), *available at* http://www.nalc.org/cau/pdf/manuals/m41.pdf. On the morning of September 13, respondent submitted a Form 3996 in which she estimated that, in light of heavy mail volume and other factors, delivering the route that had been assigned to her that day (a route that she had handled only a few times previously, *see*, *e.g.*, Tr. 465-67, 531) would exceed a regular 8-hour work day by three-and-a-half hours. *See* Pet. App. 2a, 17a. Three-and-a-half hours was not substantially more than what respondent had requested (and what her supervisors had approved) on previous occasions. *See*, *e.g.*, Tr. 148-53, 267, 308, 510; Pet. App. 24a n.4.

But respondent's supervisor, William Cox, determined, in hindsight, that respondent's estimate was off by 1.3 hours. *See* Pet. App. 2a; JA 19. He considered this overestimation particularly egregious because respondent had stopped her delivery truck to pick up first-class mail that she had seen lying in the street — something Cox considered a waste of time. *See* Tr. 136-37; Pet. App. 28a. Although no carrier in Hinesville had ever been disciplined on this ground, *see* Tr. 211-12, 360, Cox concluded that respondent's faulty estimate was cause for severe punishment, *see* Tr. 223-24. On September 18, 1997, Cox therefore sent respondent a notice charging her with failure to perform her duties in a satisfactory manner and proposing that she be fired. *See* JA 31-33; Pet. App. 2a. On November 17, 1997, the Postal Service issued a decision to remove respondent, effective November 26, 1997. *See* JA 24-30; Pet. App. 2a. After more than 12 years of dedicated service, respondent had been fired for overestimating by a little over one hour the more

than 10 hours it took to deliver a route on which she was not the regular carrier.

At the advice of her then-counsel, respondent opted to challenge her removal not by filing a grievance but by appealing to the MSPB. On September 11, 1998, an MSPB Administrative Judge rejected respondent's appeal. *See* Pet. App. 13a-43a. Although the Administrative Judge recognized that "a removal for one instance of failure to perform duties satisfactorily may appear unreasonable," *id.* at 37a, the Administrative Judge stated that respondent's prior disciplinary record made termination appropriate, *see id.* at 37a-38a; *see also id.* at 3a, 6a. Respondent then appealed to the full MSPB, but, on October 20, 1999, that body affirmed without opinion. *See id.* at 9a-10a.

4. While respondent's MSPB appeal in "Case 4" (her removal case) was just beginning in 1998, the grievance proceedings concerning "Cases 1, 2, and 3" (the prior disciplinary actions) were already well under way. In each of those cases, all steps in the grievance process except arbitration were completed before year-end 1997. *See* JA 36-37 (Step 3 decision for Case 1); JA 20-21 (same for Case 2); JA 22-23 (same for Case 3). The union therefore requested that the cases be scheduled for arbitration, and they were set for expedited hearings. *See* Respondent's Fed. Cir. Br. Att. E. The Postal Service, however, was in no hurry to have the arbitrations proceed. Under settled MSPB precedent, a defeat in arbitration would mean that the prior disciplinary actions could not be considered in support of respondent's termination, which would undermine the validity of that

action.[3] Accordingly, the Postal Service embarked upon a strategy of delay.

Thus, the Postal Service first removed the cases from the expedited arbitration docket and referred them to regular, non-expedited arbitration. *See id.*, Att. F; *see generally* Agreement Art. 15.4.C.2. That tactic did not buy much time, however, for the regular arbitration hearings were soon scheduled for August 1998. *See* Respondent's Fed. Cir. Br. Att. G. To avoid the August hearing dates, the Postal Service therefore invoked the so-called "Step 4" procedure of the collective bargaining agreement, on the pretense that an issue of contract interpretation should be resolved before the cases could be arbitrated. *See id.*, Atts. G, H; *see also* Agreement Art. 15.4.B.5; *id.* at 184.[4] Because there was no such issue, however, the Postal Service in September 1998 was forced to agree to refer the cases back to the arbitration docket. *See* Respondent's Fed. Cir. Br. Att. J. All three cases were then rescheduled for arbitration hearings in January 1999. *See id.*

When the January hearing dates approached, the Postal Service asserted a new ground for delay. It pointed out that, on September 11, 1998, the Administrative Judge in the MSPB case had sustained respondent's termination. *See id.*, Att. I. Based on that fact, the Postal Service took the position that respondent was no longer an employee.[5] Th the Postal

[3] *See Jones v. Department of Air Force*, 24 M.S.P.R. 429, 431 (1984) ("Since [the appellant's] earlier ten-day suspension . . . was reversed by grievance, it was effectively cancelled and thus should not be considered in determining a reasonable penalty for the current charge.").

[4] When cases present an interpretive issue under the collective bargaining agreement, parties can appeal them to "Step 4" at headquarters levels, followed by national arbitration. *See* Agreement Arts. 15.2, 15.4.D.

[5] *See* Agreement Art. 16.5 ("[T]he employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge to the Merit Systems Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his/her MSPB appeal.").

Service claimed, respondent was no longer entitled to the benefit of the grievance process. *See id.* ("[T]he grievant has been taken off the rolls. Therefore, the National Agreement does not and rather cannot provide coverage for her at this juncture.").[6] When the union objected on the ground that respondent's termination had not yet become final, the Postal Service again referred the cases to Step 4. *See id.*, Att. J.

Because it had no basis for the Step 4 referral, the Postal Service in due course agreed that the cases should be rescheduled for arbitration. *See id.*, Att. K. Case 1 finally went to a hearing before an arbitrator in July 1999. *See* JA 3. That hearing resulted in an August 20, 1999, decision, in which the arbitrator found for respondent and expunged the letter of warning from her record. *See* JA 13-16. That award preceded the decision of the full MSPB in Case 4 by two months, *see* Pet. App. 9a, but respondent, who was no longer represented by counsel at that time, did not know to bring the arbitrator's decision to the MSPB's attention. The Postal Service, which of course also was a party to both the arbitration and the MSPB proceeding, likewise neglected to inform the MSPB of the arbitral decision.

Cases 2 and 3 were about to go to arbitration in November 1999 when the full MSPB issued its decision in October 1999,

[6] The Postal Service's argument was based on a national arbitration decision holding that "pre-discharge grievances" do not "survive a discharge which had been made final through the grievance-arbitration machinery." *Infra*, pp. 26-27.

affirming the Administrative Judge's decision without opinion. The Postal Service wasted no time to use the MSPB's decision in support of its move to have the remaining arbitration proceedings terminated. The Postal Service again took the position that, because the full MSPB had now affirmed respondent's termination, she was no longer an employee. The union then appealed Cases 2 and 3 to Step 4, *see* Respondent's Fed. Cir. Br. Att. L, where they remained in limbo for some time.

5. Meanwhile, respondent appealed her MSPB defeat to the Federal Circuit, *see* 5 U.S.C. § 7703(a)(1), (b)(1), which must set aside any MSPB action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 7703(c)(1) (Pet. App. 57a). In her *pro se* brief, respondent argued that, because her discipline in Case 1 (the letter of warning) had been overturned by an arbitrator, her removal was unlawful because "the progression of discipline no longer exists." Respondent's Fed. Cir. Br. at [6]; *see id.* at [2] ("no progression exists"). Respondent attached a copy of the arbitrator's award (JA 3) to her brief. *See* Respondent's Fed. Cir. Br. Att. D. Respondent also argued that the MSPB had erred by relying on "prior unarbitrated suspensions." *Id.* at [2]. In its brief, the Postal Service did not respond to the merits of respondent's arguments, arguing only that respondent had waived them by neglecting to raise them before the MSPB. *See* Informal Brief and Supplemental Appendix for Respondent United States Postal Service at 17, *Gregory v. United States Postal Service*, No. 00-3123 (Fed. Cir. filed Mar. 17, 2000) ("Postal Service's Fed. Cir. Br.").

In a unanimous decision, the Federal Circuit held that respondent's removal could not stand. In its opinion, the court reasoned that, although "[t]here is no doubt that prior disciplinary actions are an important factor when considering

whether a particular penalty is reasonable under given circumstances, . . . there can also be no doubt that a penalty determination cannot be supported by an earlier prior disciplinary action that is subsequently reversed." Pet. App. 6a. Taking "judicial notice of the fact that one of the actions — the May 1997 Letter of Warning — was overturned by an arbitrator in July 1999 and ordered expunged from Ms. Gregory's personnel record," *id.* at 5a, the court stated:

> In this case, Ms. Gregory had challenged, via grievance proceedings, at least part of the prior disciplinary history that was relied upon by the Postal Service and Board in determining the reasonableness of the penalty. At the time of the Board decision, at least, it appears that these challenges were pending. If the grievances were sustained and the prior actions ordered expunged — as, indeed, happened in at least one instance in this very case — the foundation of the Board's [penalty analysis pursuant to *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981)] would be compromised. Accordingly, we hold that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits.

Id. at 7a. Finding that the MSPB had accordingly "abused its discretion," the court of appeals held that "the Board's determination that the penalty of removal was reasonable must be set aside." *Id.*

The Postal Service then filed a petition for panel rehearing, but not rehearing en banc. In that petition, the Postal Service challenged (what it termed) "the panel's *apparent* holding that a final agency decision, still pending review, is so inherently unreliable that it may not be considered by the agency or the board in selecting the appropriate penalty for a subsequent

adverse action." Petition for Rehearing of the Court's Opinion Dated May 15, 2000, at 5, *Gregory v. United States Postal Service*, No. 00-3123 (Fed. Cir. filed June 29, 2000) (emphasis added); *see also id.* at 8 ("apparent holding"); *id.* at 9 ("the Court's decision appears to hold"); *id.* at 11 ("[t]he Court's broad apparent holding"). According to the Postal Service, the Federal Circuit's "apparent holding" ran counter both to a general administrative-law principle that agency decisions must be presumed valid until reversed and to specific MSPB precedent permitting federal employers to rely on prior discipline still subject to grievance. *See id.* at 9-14.

The Postal Service conceded, however, that the MSPB's decision could not stand. As the rehearing petition put it: "The Postal Service does not contest that portion of the Court's opinion vacating the board's decision and remanding the appeal to the MSPB for further consideration in light of the arbitrator's August 28, 1999 decision. The Postal Service agrees that, on remand, it would be appropriate to exclude the May 13, 1997 suspension letter [*i.e.*, Case 1] from consideration in deciding the appropriate penalty." *Id.* at 4-5 n.3. "Ultimately," the Postal Service explained, "the Court is correct that it is appropriate to return this case to the MSPB so that the board may make a determination whether the agency would have taken the same action based upon Ms. Gregory's two remaining disciplinary actions." *Id.* at 7 & n.5.

Presumably finding the Postal Service's arguments (raised for the first time on rehearing) waived, the court of appeals denied the Postal Service's rehearing petition without opinion or dissent. *See* Pet. App. 44a. The Postal Service then filed a petition for a writ of certiorari, which this Court granted. *See* 121 S. Ct. 1076 (2001).

Meanwhile, respondent's union sought to have respondent's arbitrations in Cases 2 and 3 reactivated, reasoning that, in light of the Federal Circuit's decision, respondent was once again an employee and therefore again entitled to participate in the grievance process. *See* Opposition to United States Postal Service's Motion to Stay the Board's May 9, 2001, Order at 9 n.9, *Gregory v. United States Postal Service*, No. AT-0752-98-0261-M-1 (MSPB filed June 11, 2001). The Postal Service, however, refused to proceed, and still refuses to proceed even now. *See id.* (citing Letter from Douglas A. Tulino, Manager, Labor Relations Policies and Programs, United States Postal Service, to Ronald G. Brown, Vice President, Nat'l Ass'n of Letter Carriers, AFL-CIO (Apr. 12, 2001) ("It would be premature to consider any further administration action on these two grievances until the Supreme Court has an opportunity to conduct their review.").

SUMMARY OF ARGUMENT

I. The Postal Service asserts that the court of appeals adopted a broad rule under which federal employers, when taking disciplinary action against an employee (including termination), may not rely on prior disciplinary actions that are still the subject of a pending grievance. But that was not the court of appeals' holding. The court actually rested its decision on a narrow rule, under which *the MSPB*, in evaluating whether there is just cause for a disciplinary action, may not take into account a prior discipline that remains the subject of a pending grievance. Because respondent prevails under even that narrow rule, she has no occasion to rely on the broad rule. The Postal Service's attack on the broad rule therefore has no bearing on the outcome here.

At the certiorari stage, the Postal Service argued that there is no practical difference between the broad and the narrow

rules, because federal employers will be forced, as a practical matter, to apply the same rule that the MSPB must use in reviewing their disciplinary actions. The Postal Service does not repeat that argument here, and for good reason. Grievance proceedings concerning a prior disciplinary action will usually have been resolved by the time an appeal from a later disciplinary action reaches the MSPB. Even if the grievance is still pending, the MSPB can defer its decision until the grievance has been resolved. Thus, it simply does not follow from the narrow rule that federal employers will themselves be foreclosed from relying on prior disciplinary actions that are still subject to grievance.

The narrow rule, moreover, is hardly a novel invention. It has long been applied by labor arbitrators, both in the postal context and elsewhere. Arbitrators have rejected the notion that the narrow rule boils down to the same thing as the broad rule, and have recognized that the narrow rule can easily be accommodated through careful scheduling of successive challenges. Thus, they have recognized that the narrow rule simply places the employer to a choice between agreeing to a postponement of the later proceedings or forfeiting reliance on prior discipline.

The narrow rule thus sets forth a salutary principle, for it prevents employers from engaging in strategic gamesmanship, as the Postal Service appears to have done here. Absent the narrow rule, employers have an incentive to delay the grievance proceedings concerning prior disciplinary actions, pressing ahead with the termination appeal, securing affirmance of the termination by relying on the prior disciplinary actions, and then refusing to proceed with the grievance proceedings on the theory that the employee has been terminated and therefore is no longer entitled to pursue grievances. Moreover, the narrow rule promotes efficiency by eliminating the need for duplicative proceedings and

ensures that challenges to prior disciplinary actions will be litigated in the appropriate forum.

The narrow rule also fits comfortably within the existing framework of MSPB precedent. The MSPB has long recognized that it is fundamentally unfair to affirm a termination in reliance on prior disciplinary actions without affording the employee an opportunity to challenge the merits of those actions. Embracing the narrow rule is also consistent with the MSPB's recognition that it must enforce employee rights rooted in collective bargaining agreements. Here, the collective bargaining agreement has been interpreted to provide that, when an employee challenges a later disciplinary action, that action may not be supported on the basis of a prior disciplinary action that is still being challenged. That principle binds the MSPB just as it binds labor arbitrators.

The Postal Service wrongly suggests that the narrow rule is rendered unnecessary by two specific safeguards recognized under MSPB case law. Although the MSPB allows collateral attacks of prior disciplinary actions, it evaluates such attacks under a deferential "clear error" standard — even where the prior disciplinary actions have never gone to arbitration. And, although the MSPB has discretion to reopen its decisions if prior disciplinary actions are later set aside in arbitration, that is no comfort if, as happened here, the employer relies on the MSPB's removal decision to terminate arbitration proceedings.

II. Even if this Court does not affirm the court of appeals' judgment on the basis of the narrow rule, it should, at a minimum, leave that judgment undisturbed insofar as the court of appeals vacated the MSPB decision and remanded for a new penalty determination untainted by reliance on Case 1. In its petition for rehearing in the court of appeals, the Postal Service conceded that this aspect of the court of appeals'

decision was correct, and, even now, the Postal Service concedes that a remand is appropriate. The Postal Service nevertheless suggests that, because the arbitral decision in Case 1 was not properly included in the MSPB record, the court of appeals should not have vacated the MSPB's decision. That suggestion should be rejected. In light of its concession below, the Postal Service is estopped from challenging the court of appeals' holding. Moreover, the Postal Service failed to include its suggestion in its petition for a writ of certiorari. In any event, the court of appeals properly took judicial notice of the arbitral decision in Case 1.

III. This Court should dismiss the writ as improvidently granted for at least three reasons. *First*, this case is an inappropriate setting in which to evaluate the merit of either the broad or the narrow rule. The broad rule has never been adopted by any court, and respondent does not need it to prevail and therefore has no reason to defend it. The narrow rule is not challenged in the Postal Service's opening brief, applies in only a small class of cases, and will — in light of the collective bargaining agreement — continue to bind the Postal Service in any event. *Second*, the Postal Service failed to preserve its arguments below. When respondent urged adoption of the narrow rule, the Postal Service never addressed the argument on the merits, arguing (unsuccessfully) only that respondent had failed to preserve the argument before the MSPB. *Finally*, both the broad and the narrow rules are of only academic significance to this case. In light of the arbitral decision in Case 1, it is clear that respondent's removal cannot stand regardless of the decision in this case.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE MSPB MAY NOT RELY ON PRIOR DISCIPLINARY ACTIONS THAT ARE THE SUBJECT OF PENDING GRIEVANCES.

According to the Postal Service, the Federal Circuit in the decision below adopted a broad rule under which *federal employers*, when taking disciplinary action (particularly removal), may not rely on prior disciplinary actions that are still subject to challenge. That the Postal Service should read the opinion of the court below in a way that is so contrary to its own interests is remarkable, for nothing in the court of appeals' opinion compels that reading. As respondent explained at the certiorari stage, the much more plausible reading of the court of appeals' opinion is that it adopts the following narrow rule: that *the MSPB*, in adjudicating whether there is just cause for a disciplinary action imposed pursuant to principles of progressive discipline, may not base its determination on a prior discipline that is still subject to pending grievance. Even if the court of appeals *had* embraced the broad rule (which it did not), respondent would have no need to rely on it, and this Court would have no occasion to pass on it: respondent can readily prevail under the narrow rule.[7] The Postal Service's merits brief does not

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[7] *See, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1003 n.5 (1994) (respondent is entitled to "urge any grounds which would lend support to the judgment below") (internal quotation marks omitted); *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984) ("[O]ur precedents establish that a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below."); *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may . . . defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.").

challenge the narrow rule. That is not surprising. The narrow rule has long been applied in arbitration, properly discourages strategic gamesmanship, and is in accord with the larger framework of MSPB jurisprudence.

A. There Is No Reason To Believe That the Court of Appeals Embraced the Broad Rule That the Postal Service Attributes to It.

1. According to the Postal Service, the Federal Circuit's opinion adopted a broad rule that applies directly to employing federal agencies. Under that broad rule, federal agencies subject to review in the MSPB may not rely on prior disciplines that are still subject to grievance or appeal when taking later disciplinary action against an employee.[8] Because the Postal Service deems the broad rule both extremely harmful to federal agencies' interests (*see* Br. 32-37) and unsupported by precedent (*see* Br. 18-23), one might have expected that the Postal Service would attribute that rule to the court of appeals only if it were crystal clear that the court actually adopted it. In fact, the court of appeals nowhere espoused the broad rule that the Postal Service attributes to it. The plain text of the opinion below indicates that the court adopted a narrow rule under which only *the MSPB* must refrain from relying on prior disciplinary actions that are still

[8] *See, e.g.*, Br. 15 ("The question presented in this case is whether *federal employers* may take account of prior disciplinary actions that are subject to pending grievances.") (emphasis added); Br. 18 ("This case involves a challenge to the well-settled MSPB rule that, in disciplining or removing employees pursuant to the CSRA, *federal employers* may take account of prior disciplinary actions against an employee, even when such actions are subject to pending grievance proceedings.") (emphasis added); Br. 21 ("[T]he question presented here: whether, in disciplining or removing an employee, *an agency* may rely upon prior disciplinary actions that are 'the subject of pending grievance or arbitration procedures.'") (emphasis added).

subject to pending grievance when the MSPB adjudicates whether there is just cause for subsequent discipline.

For example, the court of appeals stated that "*the Board* erred when it rested its analysis of the reasonableness of the penalty upon [Gregory's] three prior disciplinary actions, at least some of which were then the subject of grievance proceedings." Pet. App. 5a (emphasis added). The court noted that, "[a]t the time of *the Board* decision, at least, it appears that these challenges were pending." *Id.* at 7a (emphasis added). The court reasoned that "[i]f the grievances were sustained and the prior actions ordered expunged . . . the foundation of *the Board's* Douglas [*i.e.*, penalty] analysis would be compromised." *Id.* (emphasis added). The court concluded that, "[b]ecause those prior actions that were the subject of ongoing grievance proceedings could not be used, *the Board* abused its discretion in relying upon them." *Id.* (emphasis added). In short, the court faulted *the Board* for relying on unadjudicated prior disciplinary actions — not the Postal Service.[9]

The Postal Service, however, points to parts of the court of appeals' opinion framed in the passive voice. Thus, it draws this Court's attention to a statement "'that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits.'" Br. 9, 38 (quoting Pet. App. 7a). Similarly, it points to a sentence stating that "prior disciplinary actions that are subject to ongoing proceedings may not be used to support the reasonableness of a penalty." Pet. App. 1a-2a (cited at

[9] Parts of the Postal Service's brief seem to acknowledge as much. *See, e.g.*, Br. 15 ("The Federal Circuit held that *the MSPB* erred when . . . *the Board* relied upon respondent's prior disciplinary actions in affirming the Postal Service's decision to remove respondent, when those actions remained subject to pending grievances.") (emphases added).

Br. 38). Because these sentences are framed in the passive voice, they do not indicate *who* must refrain from doing the considering or using. But the opinion nowhere states that *agencies* must so refrain, and, in light of the balance of the opinion, which is framed in terms of the MSPB, that is an unjustifiable leap.[10]

2. That the Postal Service's merits brief ignores this sensible reading of the court of appeals' opinion is all the more puzzling in light of what occurred at the certiorari stage. There, respondent clearly explained that "the terms of the Federal Circuit's opinion do not state that agencies may never rely on unresolved priors in imposing disciplinary action; the court of appeals' opinion states only that *the MSPB* may not rely on unresolved priors in sustaining disciplinary action." Br. in Opp. 16. Respondent explained that, in particular, nothing in the opinion suggested that the court of appeals would view the MSPB as erring if it were to uphold "an agency's disciplinary action in reliance on priors that, although still subject to grievance when the agency acted, had become final by the time the MSPB decided." *Id.*

Although the Postal Service's merits brief altogether ignores the narrow rule, the Postal Service did confront it in its certiorari reply. *See* Reply Br. 2-3. There, the Postal Service did not contradict the premise of respondent's observation — *i.e.*, that the court of appeals' opinion is better

[10] That is particularly so because the court of appeals stated that "[t]here is no doubt that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given circumstances." Pet. App. 6a. It is unlikely, to say the least, that the court would have made that statement while embracing the broad rule. It would no doubt have occurred to the court of appeals — no less than to the Postal Service — that the broad rule might pose an obstacle to agencies' consideration of prior disciplinary actions in many circumstances.

read to prohibit only *the MSPB* from relying on unadjudicated prior disciplinary actions. Instead, the Postal Service suggested that the narrow rule in practical effect boils down to the same thing as the broad rule. *See id.* In particular, it asserted that the possibility that the court of appeals had embraced only the narrow rule "is little comfort . . . to the numerous federal agencies whose decisions are reviewable by the MSPB. If, as the Federal Circuit held, 'prior disciplinary actions that are subject to ongoing proceedings may not be used [before the MSPB] to support the reasonableness of a penalty,' Pet. App. 1a-2a, then for practical purposes federal agencies — who must defend their actions before the MSPB — may not consider such prior disciplinary actions in calibrating the punishment for recidivist employees." *Id.* at 2 (brackets in original).

Again, the Postal Service's view is bewildering in its aggressive insistence on reading the court of appeals' opinion against its own interests. Plainly, the narrow rule is not "for practical purposes" (or for any other purposes) the same as the broad rule. In the ordinary course, grievances concerning earlier disciplines will have been resolved by the time an appeal from a later disciplinary action makes its way to the MSPB. And, in the rare case where a prior discipline is still subject to a grievance by the time the MSPB is ready to hear the appeal, the case can easily be continued to allow the grievance process concerning the earlier action to run its course. Given these arrangements, agencies will be able to rely on an employee's prior record to precisely the same extent as they always have.

B. The Narrow Rule That the Court of Appeals Did Embrace Has Long Been Applied in Arbitration Decisions That Are Binding Upon the Postal Service.

The narrow rule is hardly a novel invention by either respondent or the Federal Circuit. The narrow rule has long been applied in arbitration — as the Postal Service itself knows well. In a 1977 decision, a panel of arbitrators held that, in an arbitration challenging the termination of a postal employee, it was not free to rely on a prior discipline that, at the time, was "scheduled to be heard in Arbitration." *Arbitration in the Matter of United States Postal Service and National Post Office Mail Handlers*, Grievance No. MC-S-0874-D, at 7 (Nat'l Arb. Panel June 18, 1977) (per Paul J. Fasser, Jr.) ("*Fasser Decision*").[11] "Until that appeal is finally adjudicated," the panel explained, "it has no standing in this proceeding." *Id.*

This decision was issued in national arbitration, and therefore is as binding on the Postal Service as would be a provision of the collective bargaining agreement itself. *See* Agreement Art. 15.2 Step 4. Moreover, this decision arose under — and interpreted — a national collective bargaining agreement covering all four major postal unions, and is therefore applicable to virtually all postal workers. For these reasons, the Postal Service has been compelled to observe it ever since. *See, e.g., Arbitration Between National Association of Letter Carriers and United States Postal Service*, Case No. E94 N-4E-D 96075418, Analysis and Award at 16 (Nat'l Arb. Panel Apr. 19, 1999) (per Carlton J. Snow) ("*Snow Decision*") ("practice of giving unresolved grievances no standing in removal hearings").

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[11] Copies of this and other unpublished arbitral decisions cited in this brief have been lodged with the Clerk of this Court.

The notion that adoption of the narrow rule automatically results in adoption of the broad rule has been rejected. As one arbitrator responded: "That conclusion does not necessarily follow." *Arbitration Between United States Postal Service and National Association of Letter Carriers*, Case No. D90N-4D-D 95076768, at 19 (Reg'l Arb. Panel Mar. 20, 1996) (per Joseph A. Sickles) ("*Sickles Decision*"). "[C]ertainly [the employer] can take disciplinary action which it feels is appropriate." *Id.*; *see id.* at 21 ("I specifically reject the [Postal Service's argument] that this award would preclude Management from issuing a letter of proposed removal when there are outstanding yet unresolved prior disciplines."). But it must do so "with the understanding that there is some peril attached to that action because one (1) or more of the past elements may be overturned." *Id.*

Thus, the narrow rule's consequences are usually limited to the scheduling of successive proceedings. *See id.* ("[T]he issue presented here deals more with a scheduling problem."); *id.* ("[T]he problem once again becomes one of scheduling, rather than precluding Management from taking appropriate action."). The narrow rule requires the employer to make a simple choice: agree to schedule hearings in the proper order or forfeit reliance on prior disciplinary actions still under review. In light of that rule, the usual practice is to "postpon[e] a hearing" concerning a later discipline until earlier grievances have been resolved. *Snow Decision* at 16; *see id.* at 17 ("practice . . . of delaying decisions pending resolution of underlying grievances"). The employer loses the benefit of reliance on prior disciplinary actions only if, faced with a clear choice, it insists on pressing ahead. *See Sickles Decision* at 19-20 ("the Postal Service was aware of

the potential problems in this case"); *id.* at 21 ("[t]he parties were fully aware of the potential problem from the outset").[12]

C. The Narrow Rule Is Sensible and Correct.

It is further clear just why arbitrators (and, now, the Federal Circuit) have embraced the narrow rule: the narrow rule is necessary to eliminate incentives to engage in strategic gamesmanship. Whereas the Postal Service contends that the broad rule gives unions an incentive to delay arbitration of prior disciplinary actions in the hope of precluding reliance on them, *see* Br. 32-37, the narrow rule is necessary to avoid giving *employers* an incentive to delay arbitration of prior disciplinary actions in the hopes of thwarting those arbitrations entirely.

1. Collective bargaining agreements commonly govern only current employees. Thus, terminated employees usually lose protection and are no longer permitted to participate in the grievance process. *See supra*, pp. 10-11 n.5 (quoting Agreement Art. 16.5). A national arbitral decision interpreting the collective bargaining agreement between the Postal Service and respondent's union has reached precisely

[12] This rule is observed not only in the postal context, but in labor arbitration throughout the public and private sector. *See, e.g., Metal Trades Council, Philadelphia Federal Employees and Department of Defense, Navy, Philadelphia Naval Shipyard*, 87 FLRR 2-1497, LAIRS 18045 (July 31, 1987) ("The 10-day suspension grievance having yet to be finalized leaves this arbitrator no alternative but to disregard its effect and impact on rendering a decision in this case."); *Arbitration Between Island Creek Coal Co. and United Mine Workers*, Case No. 93-23-96-06, 1996 WL 607192 (Mar. 15, 1996) (where a prior suspension is still the subject of arbitration, it "cannot be held against the Grievant in this action and will not be considered in this Award"); *see id.* ("An attempt was made to accommodate the Parties until such time as the prior discipline could be resolved. Failing to do so, the Company determined that this discharge would rise or fall solely on the events of February 15, 1996, and the Grievant's prior work record.").

that result. *See Arbitration Between United States Postal Service and National Association of Letter Carriers*, Case No. H7N-5P-C 1132 (Nat'l Arb. Panel Mar. 26, 1990) (per Richard Mittenthal). That decision held that "pre-discharge grievances" do not "survive a discharge which [has] been made final." *Id.* at 7.

Accordingly, failure to recognize the narrow rule would permit unseemly bootstrapping. Without the narrow rule in place, employers have an incentive to manipulate the system by delaying the grievance proceedings concerning prior disciplinary actions, pressing ahead with the termination appeal, securing affirmance of the termination by relying on the prior disciplinary actions, and then turning around to have the grievance proceedings concerning the prior disciplinary actions dismissed on the theory that the employee has been terminated and therefore is no longer entitled to pursue grievances. If successful, this strategy would allow employers to circumvent principles of progressive discipline and to deprive both the union and the employee of collectively bargained (and statutorily protected) contractual rights.

The facts of this very case illustrate the concern. The Postal Service's apparent strategy throughout this case has been to have the MSPB proceeding leap-frog the pending grievance proceedings — thereby enabling it first to rely on respondent's three prior disciplinary actions in seeking MSPB affirmance of respondent's removal and then to insulate the prior disciplinary actions from review on the theory that, once respondent's removal had been affirmed by the MSPB, respondent was no longer an employee and therefore no longer entitled to the benefit of the grievance machinery. Indeed, that this was the Postal Service's strategy appears to be undisputed. At the certiorari stage, respondent described this strategy in detail. *See* Br. in Opp. 18-19 & n.12. The

Postal Service did not respond to this showing in its reply brief, and it does not respond to it now.

Even where a collective bargaining agreement does not cut off grievance rights upon termination (or where the discipline relying on unarbitrated prior disciplinary actions falls short of termination), the narrow rule is still a salutary one. As the Postal Service in effect concedes, where a prior disciplinary action is overturned through the grievance process, reopening of MSPB proceedings is necessary to avoid unfairness. *See* Br. 31 ("the ability to reopen MSPB decisions when the outcome of a grievance undermines an MSPB decision eliminates any unfairness"). Postponing the MSPB proceedings until the prior disciplinary actions have been arbitrated eliminates the need for reopening, thereby helping to conserve the MSPB's scarce resources. Moreover, the narrow rule promotes comity between different decision-makers by assuring that the MSPB does not resolve claims that are and should be litigated before labor arbitrators.

2. With the narrow rule in place, neither the employer nor the union has any incentive to delay arbitration proceedings concerning prior disciplinary actions. Indeed, because a terminated employee is usually without income while arbitration proceedings are pending, the union has every incentive to expedite those proceedings. *Cf. Milner v. Department of Justice*, 87 M.S.P.R. 660, 665 (2001). And it is a matter of simple logic that, in the normal course, challenges to prior disciplinary actions will be resolved sooner than challenges to later ones, and that grievances concerning prior disciplinary actions therefore will usually have been resolved by the time the MSPB is ready to decide. *See Snow Decision* at 13 ("The parties concede that the situation in dispute arises rarely and that underlying grievances generally do not remain unresolved at the time of a removal hearing.").

Indeed, if anything, grievance proceedings usually proceed at a faster pace than MSPB proceedings. The collective bargaining agreement here in question calls for an arbitration decision in well under one year. *See* Agreement Arts. 15.2, 15.4. In contrast, the MSPB took almost two years to decide this case, and that appears to be par for the course. *See* Office of Policy and Evaluation, MSPB, *Issues of Merit* (Dec. 1999), *available at* http://www.mspb.gov/studies/99decnws.pdf. Thus, a later-initiated MSPB proceeding will rarely leap-frog an earlier-initiated grievance proceeding.

The Postal Service nevertheless suggests that grievance proceedings usually take longer to resolve than MSPB proceedings. But its single item of evidence is the assertion that "[r]espondent's grievances challenging the June 1997 and August 1997 suspensions are still pending after more than three years." Br. 34. It is difficult to comprehend how the Postal Service, given its own manipulation of the scheduling in the underlying arbitration proceedings, can make that assertion with a straight face. As explained above and at the certiorari stage (and never contradicted by the Postal Service), the failure of respondent's grievances to proceed to arbitration is due entirely to the Postal Service's own purposeful delay. *See supra*, pp. 9-12; *see also* Br. in Opp. 18 ("That respondent's grievances are still pending is due entirely to the Postal Service's own delay."). The Postal Service's reliance on the fruits of its own dilatory efforts as a basis for justifying a rule visiting harsh consequences on the victim of those efforts brings to mind the pun about the boy who, after murdering his parents, begged the court to have mercy on an orphan.

In sum, the narrow rule will rarely result in delay, and, where it does, that delay will be short. That is a small price to pay for a rule that prevents considerable injustice and, at a

minimum, inefficient and duplicative reopening of proceedings.[13]

D. The Narrow Rule Fits Comfortably Within the Existing Framework of MSPB Jurisprudence.

The Postal Service further suggests that the court of appeals adopted a rule that is contrary to a vast body of long-standing MSPB precedent. *See* Br. 18. In particular, the Postal Service argues, the Federal Circuit's rule is inconsistent with a body of precedent in which the MSPB held that "'an agency may rely on a record of past discipline even where a prior disciplinary action is the subject of a pending grievance.'" Br. 22 (quoting *Freeman v. Department of Transp.*, 20 M.S.P.R. 290, 292 (1984)). But the Postal Service's assertion hinges upon the premise that the court of appeals adopted the broad rule. As already explained, that view is

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[13] At the certiorari stage, the Postal Service suggested that even this small price is too much to pay. *See* Reply Br. 3 ("a rule requiring the MSPB to delay its decisions would contravene the intent of Congress in enacting the [CSRA]," because "one of the purposes of that Act was to *streamline* the appeals process"). But the MSPB has general authority to permit continuances that are "consistent with the interests of fairness." 5 U.S.C. § 7701(i)(1); *see also* 5 C.F.R. § 1201.51(b). Nothing suggests that Congress intended to prohibit the MSPB from using its general authority in this particular set of circumstances. *See Key v. United States Postal Service*, 31 M.S.P.R. 197, 200 (1986) ("[w]e shall . . . abstain and defer to the District Court's ruling on [an issue also presented in the case before the MSPB]"); *Rice v. Department of Treasury*, 52 M.S.P.R. 317, 321 (1992) ("It is the Board's policy to stay its proceedings when criminal proceedings involving the same matter are pending."); *see generally Roberson v. Department of Health & Human Services*, 24 M.S.P.R. 240, 241-42 (1984) (availability of continuance may further "principles of equity and justice"); *cf. Snow Decision* at 17 ("Neither language in the parties' agreement nor evidence of any past practice established that the parties intended to prevent an arbitrator from granting a continuance in a removal case for the purpose of allowing an underlying grievance to be resolved.").

entirely conjectural. *See supra*, pp. 21-22. And the narrow rule, far from being contrary to MSPB precedent, is strongly supported by the MSPB's existing jurisprudential framework.

1. While the MSPB has said that *an agency* does not necessarily act unlawfully when it relies on prior disciplinary actions that are still under review, *see* Postal Service Br. 22 & n.5, it does not appear that the MSPB has ever expressly addressed the question presented here: whether *the MSPB itself* may rely, in affirming a termination, on prior disciplinary actions that are still the subject of pending grievance proceedings. Indeed, in cases where the MSPB affirmed a termination that was imposed in reliance on prior disciplinary actions that were still subject to grievance when either the agency or the administrative judge acted, the MSPB often was careful to point out that the grievance proceedings had been resolved by the time the matter reached the full Board.[14]

If the MSPB had confronted the precise issue here presented, it likely would have agreed with the Federal Circuit, for the narrow rule is entirely consistent with the MSPB's larger decisional framework. The MSPB has broadly acknowledged that "[f]undamental fairness requires that the Board not rely on charges which have never been proven." *Howard v. Department of Army*, 6 M.S.P.R. 205, 206

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[14] *See, e.g., Morgan v. Department of Defense*, 63 M.S.P.R. 58, 61 (1994) ("The agency stated that the union withdrew its request for arbitration before the administrative judge issued his decision, that the appellant's grievance concerning the suspension was denied, and that the suspension has become final."); *Harrison v. Department of Treasury*, 42 M.S.P.R. 614, 622 (1989) (pointing out that arbitral decision denying grievance was issued after termination but before administrative judge's decision); *Ramseur v. Department of Navy*, 16 M.S.P.R. 104, 106 n.3 (1983) (appellant "did not proffer with his petition any evidence that the [prior disciplinary] action was overturned in the grievance procedure").

(1981). For that reason, the MSPB has held that it is inappropriate to rely on prior disciplinary actions that the employee has never been able to challenge. *See Bolling v. Department of Air Force*, 8 M.S.P.B. 658, 660 (1981). For that same reason, the MSPB has recognized that it is inappropriate to rely on prior disciplinary actions that have been vacated. *See Jones*, 24 M.S.P.R. at 431 ("Since [the appellant's] earlier ten-day suspension . . . was reversed by grievance, it was effectively cancelled and thus should not be considered in determining a reasonable penalty for the current charge.").

These MSPB decisions necessarily imply that it is not "in accordance with law" (5 U.S.C. § 7701(c)(2)(C)) for the MSPB to rely, in making a "just cause" determination, on a prior disciplinary action that has already been set aside or that could not have been challenged. If that is so, then, plainly, it is also not "in accordance with law" to rely on a prior disciplinary action that, while grieved, has not been arbitrated and that, by virtue of the termination being affirmed, will never be arbitrated in the future. The Federal Circuit was therefore correct in holding that, insofar as the MSPB overlooked the inconsistency, it acted unlawfully. *See* 5 U.S.C. § 7703(c)(1).

2. That conclusion is particularly apt in the postal context. With this Court's express approval, *see Cornelius*, 472 U.S. at 659 & n.13, 665, the MSPB has long held that, "where the provisions of a collective bargaining agreement establish non-discretionary policy under which an agency operates, the provisions of the agreement shall be treated by the Board in the same manner as are provisions of the agency's regulations. The Board will, therefore, enforce employee rights derived from such a negotiated agreement." *Robinson v. United States Postal Service*, 28 M.S.P.R. 681, 684 (1985); *see Senior v. United States Postal Service*, 85

M.S.P.R. 283, 288 (2000) ("The Board treats the provisions of a collective bargaining agreement in the same way it treats agency regulations."); *Jordan v. United States Postal Service*, 32 M.S.P.R. 404, 407 (1987) ("[T]he Board has consistently held that it has inherent and broad enforcement authority and will enforce employee rights derived from . . . negotiated collective bargaining agreements.").

Based on this principle, where an applicable collective bargaining agreement provides that disciplinary actions may no longer be considered after some time, *see, e.g.*, Agreement Art. 16.10; *see generally* Postal Service Br. 33-34, the MSPB will not consider them, *see Lewis v. Department of Air Force*, 51 M.S.P.R. 475, 485 (1991) ("[T]he Board will discount a prior action used to support the appropriateness of an agency-imposed penalty when a law, rule or regulation prohibits the consideration of such actions after a period of time. A collective bargaining agreement is treated as a provision of the agency's regulations.") (citations omitted); *Deutsch v. United States Postal Service*, 39 M.S.P.R. 386, 389 (1989) ("In this case, the collective bargaining agreement prohibits the consideration of any prior disciplinary action if there has been no intervening disciplinary action within two years. . . . The administrative judge . . . erred by considering the evidence of both the 1981 and 1982 actions, since its consideration by the agency was prohibited under the terms of the collective bargaining agreement . . . .").

Here, a national arbitration decision has interpreted the collective bargaining agreement to provide that, in proceedings concerning an employee's challenge to a later disciplinary action, that action may not be supported with "a disciplinary action that was scheduled to be heard in Arbitration," and that therefore was not "finally adjudicated." *Fasser Decision* at 7. Under the applicable collective

bargaining agreement, moreover, a national arbitration decision has the same force as a provision of the agreement itself. *See supra*, p.24. Thus, on the basis of settled precedent, the holding of that arbitration decision must be regarded "in the same manner as are provisions of the agency's regulations." *Supra*, p.32. The Federal Circuit was therefore entirely correct insofar as it held that, in the postal context, the MSPB may not rely on prior disciplinary actions that are still the subject of a pending grievance. Any other rule would result in "the very inconsistency and forum shopping that Congress sought to avoid." *Cornelius*, 472 U.S. at 662.

E. The Procedural Protections to Which the Postal Service Points Do Not Render the Narrow Rule Unnecessary.

The Postal Service does not seriously contest that there is considerable unfairness in allowing reliance on a prior disciplinary action that has not and never will be arbitrated. *See* Br. 31 ("the potential unfairness that concerned the court below"). But, the Postal Service submits, that unfairness will never come to pass, because two existing safeguards will prevent it. *See id.*; *see also* Br. 27 ("the MSPB's rule governing the consideration of prior disciplinary actions provides employees with ample procedural protections"); Br. 37 ("[t]he elaborate procedures established by the CSRA and the MSPB — including the *Bolling* rule and reopening procedure — provide employees more than sufficient process"). Regrettably, the Postal Service is mistaken.

1. The Postal Service points out that, under *Bolling*, the MSPB will permit collateral attack of prior disciplinary actions if the employee has not been afforded an opportunity to challenge them. Thus, the Postal Service claims, "[t]he *Bolling* rule governing the consideration of prior disciplinary

actions ensures that the employee does not lose the protections that accompany adverse action by agency reliance on prior minor discipline unaccompanied by such protections." Br. 28. That, however, is not so. The *Bolling* rule does permit collateral attack of prior disciplines, but does not always permit *de novo* review. *De novo* review is available only in the small class of cases in which an employee has had no "opportunity to dispute" the prior disciplinary action at all. *Bolling*, 8 M.S.P.B. at 659.

The "opportunity to dispute" trigger is a sensitive one indeed. Under MSPB precedent, an employee is deemed to have had an "opportunity to challenge" when the employee merely initiated the grievance process, even if the grievance was in the early stages and had not yet reached arbitration. *See, e.g., Wilson v. Department of Justice*, 58 M.S.P.R. 96, 99 n.2 (1993).[15] The first steps of the grievance process, however, typically involve nothing more than a decision by management. *See* Agreement Art. 15.2. Although these initial steps are important in that they often result in a compromise that both parties can accept, *see* Postal Service Br. 34 n.11, the deciding officials obviously are not impartial. To the contrary, they have an inherent incentive to overcharge in the early stages of the process so as to be able to bargain down penalties during later stages. *See* Br. in Opp. 22.[16]

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[15] Indeed, the present case illustrates just that: the Administrative Judge held that, because "the appellant had the opportunity to grieve [the prior disciplinary actions], the Board's review of a prior disciplinary action is limited to determining whether that action is clearly erroneous." Pet. App. 36a-37a.

[16] To accord such decisions a "presumption of regularity," Postal Service Br. 36, therefore, is fundamentally out of keeping with the nature of the grievance process, *see* Br. in Opp. 21. Besides, rejection of the narrow rule would establish not just a "presumption" — it would establish

If the employee had any opportunity to challenge the prior disciplinary action at all, the standard is review for clear error only. *See Bolling*, 8 M.S.P.B. at 660. That standard is exceedingly deferential. *See*, *e.g.*, *id.* (clear error means that the Board "is left with the definite and firm conviction that a mistake has been committed") (internal quotation marks omitted); *Ally v. Department of Navy*, 58 M.S.P.R. 680, 683 (1993) (same); *Lewis*, 51 M.S.P.R. at 484 (same). Of the hundreds of cases that the MSPB has decided in the past 20 years, we know of only one case in which it found that clear error had occurred. *See Eichner v. United States Postal Service*, 83 M.S.P.R. 202, 210 (1999) (prior disciplinary actions imposed in connection with conduct that had already been penalized was clearly erroneous). In literally scores of other cases, the MSPB has held after only summary review that prior disciplinary actions were not clearly erroneous.[17]

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an *irrebuttable* presumption. As already explained, in the absence of the narrow rule, the regularity of prior disciplinary actions in many cases will never be tested at all.

[17] *See*, *e.g.*, *Morgan*, 63 M.S.P.R. at 61 ("Having reviewed the record evidence concerning the matter, the Board is not left with the definite and firm conviction that a mistake has been committed.") (internal quotation marks omitted); *Lewis*, 51 M.S.P.R. at 484 ("Because the prior actions relied upon by the agency are not clearly erroneous, they will not be discounted for this reason."); *Hubbard v. United States Postal Service*, 32 M.S.P.R. 505, 508-09 (1987) ("[T]he Board has considered the matter and finds that our review of the record does not lead to the conviction that a mistake was committed."); *Freeman*, 20 M.S.P.R. at 292 (same); *Walker v. Veterans Admin.*, 12 M.S.P.R. 491, 493 (1982) ("[U]pon consideration of appellant's arguments and the agency's written documentation of the prior actions, we are not convinced that they were clearly erroneous."); *Carr v. Department of Air Force*, 10 M.S.P.R. 498, 500 (1982) ("[O]ur study of the disciplinary notices and grievance papers of record does not lead to the conviction that a mistake was committed.").

With only the *Bolling* rule to protect an employee, then, it is still entirely possible to deny an employee any measure of meaningful review before an impartial official — in violation of the requirement that the agency sustain its burden of showing just cause "by a preponderance of the evidence." 5 U.S.C. § 7701(c)(1)(B); *see*, *e.g.*, *Hanson v. Tennessee Valley Auth.*, 18 M.S.P.R. 705, 707 (1984); *Johnson v. Department of Air Force*, 13 M.S.P.R. 236, 238-39 (1982). Moreover, even if the *Bolling* framework would afford the employee *de novo* review where arbitration has not yet taken place in the prior disciplinary action, the employee would of course still lose her right to the forum of her choice: arbitration.

2. The Postal Service argues that employees can find an additional measure of protection in the MSPB's reopening procedure, as set forth in 5 C.F.R. § 1201.118. *See* Br. 28. The Postal Service contends that, when the MSPB has affirmed an employee's disciplinary action in reliance on a prior discipline that is later vacated in the grievance process, the employee can seek reopening of her termination. *See id.* According to the Postal Service, "[t]he Board is receptive to such requests." Br. 22 (citing *Payne v. United States Postal Service*, 69 M.S.P.R. 503, 508 (1996), *Lopez v. Department of Justice*, 55 M.S.P.R. 644, 646 (1992), and *Jones*, 24 M.S.P.R. at 431). Thus, the Postal Service concludes that "[t]he ability to reopen MSPB decisions might well prove sufficient standing alone to protect employees." Br. 28.

But the MSPB's ability to reopen its decisions provides no solace at all to employees in respondent's predicament. As explained above, collective bargaining agreements commonly require that pending grievances be dismissed once the employee's removal becomes final. Thus, reopening will not help the employee at all: once the MSPB affirms her termination, prior grievance proceedings are discontinued.

Thus, an arbitration decision that might later merit a reopening of the MSPB's proceedings simply will not be forthcoming.

The MSPB decisions on which the Postal Service relies (Br. 22) simply do not address such circumstances. The employee in *Payne* had been terminated in reliance on a criminal conviction that was reversed on appeal after the MSPB affirmed the termination. Plainly, the employee's criminal appeal did not terminate with the MSPB's decision. The employee in *Lopez* was never terminated: in reliance on a previous disciplinary action that was later overturned by an arbitrator, the employer had imposed only a suspension — not a termination that would have cut off the employee's continuing right to rely on the grievance machinery. Finally, *Jones* is entirely inapposite, because that case did not involve reopening at all. The prior disciplinary action in *Jones* had been vacated in the grievance process after the administrative judge's decision but before the case reached the full MSPB.

II. AT A MINIMUM, THE COURT OF APPEALS' DECISION SHOULD BE LEFT UNDISTURBED INSOFAR AS IT PROHIBITED RELIANCE ON CASE 1.

Even if this Court were to reject the narrow rule, it should still leave the court of appeals' decision undisturbed insofar as it vacated the MSPB decision and remanded for a new decision untainted by reliance on Case 1. Respondent was terminated in reliance on three prior disciplinary actions. Of those three prior actions, the first, Case 1, has already been set aside in arbitration. *See supra*, p.11. Thus, under settled MSPB precedent, the MSPB was not entitled to rely on that prior disciplinary action. *See, e.g., Jones*, 24 M.S.P.R. at 431 ("Since [the appellant's] earlier ten-day suspension . . . was reversed by grievance, it was effectively cancelled and

thus should not be considered in determining a reasonable penalty for the current charge.").

Not surprisingly, therefore, the Postal Service conceded below that the decision of the court of appeals was correct insofar as it set aside the MSPB's decision and remanded for a new determination without consideration of Case 1. In its petition for rehearing, the Postal Service expressly and unequivocally stated that "the Court is correct that it is appropriate to return this case to the MSPB so that the board may make a determination whether the agency would have taken the same action based upon Ms. Gregory's two remaining disciplinary actions." *Supra*, p.14.

Although the Postal Service even now concedes that "a remand remains necessary to permit the court to consider the effect of the arbitrator's invalidation of one prior action," Br. 38, it half-heartedly attempts to back-track on its previous concession that the case must be remanded to the MSPB, *see* Br. 38-39. Thus, the Postal Service suggests that "the proper course may be for the Federal Circuit to resolve this appeal against respondent and for respondent to file a motion to reopen directly with the MSPB." Br. 39. That is appropriate, the Postal Service contends, because respondent neglected properly to place the arbitrator's decision in the record. *See id.*

It is not entirely clear what the Postal Service expects from this Court on this point. If the Postal Service truly believed that it is appropriate "to resolve this appeal against respondent," there presumably would be no need for the remand that it concedes is required. Perhaps the Postal Service is hoping simply for helpful language in this Court's opinion. But, if even the Postal Service does not have the courage of its convictions, it is unclear why this Court should address the matter. The much more obvious approach would

be simply to let this aspect of the court of appeals' decision stand undisturbed.

In any event, even if the Court were inclined to entertain the Postal Service's uncertain suggestion, that suggestion should be rejected. *First*, the Postal Service's concession in its rehearing petition was unequivocal and directly contrary to what it argues now. Thus, that concession gives rise to judicial estoppel. *See, e.g., New Hampshire v. Maine*, 121 S. Ct. 1808, 1814-15 (2001). *Second*, the Postal Service waived the point by failing to raise it in its petition for a writ of certiorari. Nothing in the petition suggested that the Postal Service intended to challenge even this aspect of the court of appeals' decision.[18] *Finally*, the court of appeals was plainly correct in taking judicial notice of the arbitrator's decision. That decision is a matter of public record, and therefore does not need to be formally entered into evidence — no more than, say, a new judicial decision.[19]

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[18] The Postal Service for the first time addressed the issue in its reply brief, making the same half-hearted proposal that it makes now. *See* Reply Br. 7 n.4. That proposal came too late. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280 (1993) ("it is the petition for certiorari (not . . . later briefs) that determines the questions presented"); *Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality) ("disapprov[ing]" of "practice of smuggling additional questions into a case after [Court] grant[s] certiorari").

[19] *See, e.g., Consolidation Coal Co. v. United Mine Workers*, 213 F.3d 404, 407 (7th Cir. 2000) (Posner, J.) ("The decisions of the other three arbitrators were not evidence — the sort of thing a prohibition against reopening the record would cover. They were the arbitral equivalents of judicial decisions, of which, of course, a court can take judicial notice . . . ."); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 n.3 (8th Cir. 1994) (taking judicial notice of arbitration decision); *United States Postal Service and American Postal Workers Union, AFL-CIO*, 302 N.L.R.B. 767, 778 n.16 (1991) (arbitration decisions "are official documents and matters of public record"). The single decision on which the Postal Service relies (Br. 39) is unhelpful to its cause. That decision, *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc) — which was in any event severely limited in a later decision, *see Lising v. INS*, 124 F.3d 996, 998 (9th Cir. 1997) — had nothing to do with arbitration decisions, instead addressing the consideration of material that plainly was not a matter of public record.

III. THIS COURT SHOULD DISMISS THE WRIT AS IMPROVIDENTLY GRANTED.

As explained above, this Court should affirm on the basis of the narrow rule, or, at a minimum, leave undisturbed the aspect of the court of appeals' decision remanding for a new penalty decision without consideration of Case 1. In the alternative, the Court could dismiss the writ as improvidently granted. There are at least three separate reasons why that would be appropriate.

A. This Case Does Not Provide a Proper Setting To Consider Either the Broad or the Narrow Rule.

For the reasons explained in Part I of this brief, the Postal Service's challenge to the Federal Circuit's decision is a tempest in a teapot. The Postal Service has devoted its entire opening brief to challenging a rule that simply is not implicated in this case. There is no reason to believe that the Federal Circuit has embraced the broad rule that the Postal Service attributes to that court. Moreover, because respondent easily prevails under even the narrow rule that the court of appeals did adopt, respondent has no occasion to defend the broad rule that the Postal Service challenges. Plainly, then, if the Court were inclined to evaluate the broad rule's legal merit, this is not a proper setting for that task.

Nor is this case an appropriate vehicle to consider even the narrow rule. For one thing, there is not a single word in the Postal Service's brief challenging or otherwise addressing that rule. That is particularly remarkable because respondent's brief in opposition plainly put the Postal Service on notice

that respondent intended to rest on that rule. *See* Br. in Opp. 16-22. If the Postal Service intends to challenge the narrow rule, its failure to do so in its opening brief deprives respondent of a fair opportunity to respond to its arguments. For another thing, the narrow rule — which comes into play in only a small class of cases, *see supra*, p.28 — will continue to bind the Postal Service regardless of what happens in this case: the narrow rule has been adopted by a national arbitration decision that has the same force as a provision of a collective bargaining agreement, and therefore will be applied by arbitrators and the MSPB alike. *See supra*, pp. 32-34. Regardless, it is unclear why this Court should be enlisted to fine-tune MSPB rules to take account of a factual setting that has never been expressly addressed by the MSPB itself.

B. The Postal Service Failed To Preserve Its Arguments Below.

When respondent argued in her Federal Circuit brief that the MSPB erred by relying on unarbitrated prior disciplinary actions, the Postal Service did not respond by arguing what it so elaborately argues now — that the law *permits* reliance on such actions. *See supra*, p.12. Instead, the Postal Service submitted only that respondent had failed properly to raise that issue before the MSPB. *See id.* Although the Postal Service did challenge respondent's argument in its petition for rehearing, that challenge came too late. The Federal Circuit (like most circuits) will not hear a losing appellee to make legal arguments for the first time in a petition for rehearing. *See Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998) ("[W]e decline to address the government's new theory raised for the first time in its petition for rehearing."). As this Court stated only last Term in another case arising from the Federal Circuit, "issues must be raised in lower courts in order to be preserved as potential grounds of decision in

higher courts." *Nelson v. Adams USA, Inc.*, 120 S. Ct. 1579, 1586 (2000).

At the certiorari stage, the Postal Service did not seriously deny that, unless it could reasonably be viewed as having addressed the issue in its court of appeals brief, this case would not properly be here. But the Postal Service contended that a single sentence in that brief *had* preserved the issue. *See* Reply Br. 5. That is simply wrong. The single sentence to which the Postal Service pointed said: "In determining the reasonableness of the penalty, Gregory's disciplinary record was correctly considered." Postal Service's Fed. Cir. Br. 16. That sentence had nothing to say about consideration of aspects of a disciplinary record that are subject to pending grievances and certainly did not put the court of appeals on notice of the argument presented to this Court.

Indeed, read in context, it is clear that the quoted sentence addressed an issue altogether distinct. The next three sentences in the Postal Service's brief read:

> This is particularly true here as Gregory was previously disciplined for the same infraction, and she was warned that it was a serious offense. This clearly establishes a pattern of dishonest conduct. This Court has held that "removal for dishonesty has been upheld by this court's predecessor on a number of occasions."

Id. (citation omitted). These sentences make plain that the preceding sentence was intended to address the question whether respondent's termination was unduly harsh (and therefore vulnerable to reversal under *Douglas*) *assuming* that consideration of respondent's three prior disciplinary actions was permissible. That inference is fortified here because the Postal Service's waiver argument (countering respondent's argument that the MSPB had erred by relying on

unadjudicated prior disciplinary actions) was contained in a separate paragraph on a different page.[20]

Thus, the court of appeals simply was not "fairly put on notice as to the substance of" the Postal Service's objection to the narrow rule. *Nelson*, 120 S. Ct. at 1586.[21] Moreover, the most plausible interpretation of the court of appeals' denial of rehearing is that it determined that, if the Postal Service had any legitimate objection to either the broad or the narrow rule, that objection had been waived insofar as this case was concerned: it is unlikely that the court of appeals would have refused to rehear a serious government argument that previously had been made but overlooked. This Court usually will not entertain arguments when a court of appeals has determined that they were not adequately preserved. *See Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 121 S. Ct. 1776, 1780 (2001).[22]

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[20] Besides, even assuming that the author of the first sentence subjectively intended to address the issue of reliance on unadjudicated prior disciplinary actions, the court of appeals was under no duty to tease that meaning out of a sentence that, objectively considered, did not say it. *See, e.g., United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. . . . Judges are not expected to be mindreaders.") (internal quotation marks omitted), *cert. denied*, 494 U.S. 1082 (1990); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) ("[w]e will not resolve that issue on the basis of briefing and argument by counsel which literally consisted of no more than the assertion of violation of due process rights") (Scalia, J.).

[21] Accordingly, it ill behooves the Postal Service now to criticize the court of appeals for the brevity of its discussion. *See* Br. 29, 30.

[22] This Court *has* said that "[i]t is a permissible exercise of our discretion to undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent." *United States v. Williams*, 504 U.S. 36, 44-45 (1992). But that exception to the normal waiver rules is plainly inapplicable here. The Postal Service has never addressed the issue of reliance on unadjudicated prior disciplinary actions — here or elsewhere.

C. The Broad and Narrow Rules Are of Only Academic Significance to This Case.

Even if any issue concerning consideration of prior disciplinary actions was properly preserved, that issue has little bearing on this case. As discussed above, the Postal Service has conceded that, in light of the arbitral decision vacating Case 1, a new penalty decision must be made. *See supra*, p.14. And, in light of applicable principles of "progressive discipline," *see supra*, p.4, the Postal Service cannot sensibly re-impose termination as the penalty in this case — even if the remaining disciplinary actions in Cases 2 and 3 could properly be considered.

The Postal Service penalizes successive infractions — unless so serious as to warrant immediate termination — in a series of penalties of increasing severity. *See supra*, p.4. As illustrated by the facts of this case, four levels of punishment are commonly used: (1) letter of warning, (2) 7-day suspension, (3) 14-day suspension, and (4) removal. *See* Agreement Arts. 16.3-16.5. Contrary to the Postal Service's implication (*see* Br. 25-26), this system of progressive discipline is hardly a matter of administrative grace. Where the Postal Service imposes a penalty that is out of keeping with the usual progression, either an arbitrator or the MSPB will set it aside on the ground that "cause" has not been established.[23]

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[23] *See* Agreement Art 16.1 ("[D]iscipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause . . . ."); *see also Sublette v. Department of Army*, 68 M.S.P.R 82, 89-90 (1995); *Castellanos v. Department of*

It is undisputed that respondent cannot and will not legally be terminated if none of her three prior disciplinary actions may be considered. And it is extremely unlikely that the Postal Service would be permitted to terminate respondent even if Cases 2 and 3 may be considered. As even the Administrative Judge recognized, respondent's termination was a borderline removal case even with three prior disciplinary actions in her record. *See* Pet. App. 37a. With one of those actions removed, then, a removal penalty plainly could not survive *Douglas* scrutiny. Indeed, even the Postal Service itself cannot bring itself to say more than that, "even considering the arbitrator's decision expunging the *first* disciplinary action, respondent's removal *may* still be supported by substantial evidence." Br. 39 n.13 (second emphasis added).

With Case 1 removed from the mix, therefore, the MSPB would no doubt mitigate respondent's punishment to a non-removal penalty — say, a 14-day suspension. *Cf. Hagmeyer* v. *Department of Treasury*, 757 F.2d 1281, 1285 (Fed. Cir. 1985); *Lopez*, 55 M.S.P.R. at 646-47; *Jones*, 24 M.S.P.R. at 431; *Douglas*, 5 M.S.P.B. at 330-31, 341. Thus, consideration of Cases 2 and 3 holds small practical significance: whereas Case 4 without any prior disciplinary actions would not merit more than a letter of warning, Case 4 with consideration of Cases 2 and 3 still would warrant at the very most, say, a 14-day suspension.[24] There is no pressing reason why the difference (two weeks' worth of back pay) need consume this Court's attention.

Army, 62 M.S.P.R. 315, 324 (1994); *Whitmore v. Department of Navy*, 34 M.S.P.R. 137, 140-41 (1987); *Crumbaker v. Department of Labor*, 7 M.S.P.R. 84, 89-90 (1981).

[24] Meanwhile, moreover, the pending arbitrations in Cases 2 and 3 would be revived, which might result in further mitigation later.

CONCLUSION

The judgment of the court of appeals should be affirmed. In the alternative, the writ should be dismissed as improvidently granted.

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No. 00-758

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

MARIA A. GREGORY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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UNITED STATES POSTAL SERVICE, PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The Federal Circuit held that in imposing discipline against federal workers, "as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." Pet. App. 7a. In adopting that rule, the Federal Circuit improperly substituted its judgment for that of the MSPB and countless federal employers and overturned the longstanding administrative practice allowing consideration of prior disciplinary actions subject to pending grievances.

Rather than defend the Federal Circuit's decision on its terms, respondent attempts to recast that decision as establishing a "narrow rule" that affects "only *the MSPB*" (Resp. Br. 20), and leaves federal employers free to consider prior disciplinary actions in calibrating progressive discipline. The Federal Circuit's decision cannot bear that strained construction. The decision itself, the Federal Circuit's

subsequent treatment of the decision, and basic principles of administrative law all demonstrate that the Federal Circuit's ruling prevents the MSPB and federal employers alike from considering prior discipline subject to pending grievances. Moreover, even if the Federal Circuit had adopted respondent's "narrow rule," its decision still would conflict with longstanding administrative practice and the clear intent of Congress in enacting the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*

The bottom line remains that the Federal Circuit erred in vitiating a settled administrative practice that is not remotely "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 7703(c)(1). This Court should reverse the judgment below and remand to the Federal Circuit for consideration of the appropriate relief.

I. The Federal Circuit Did Not Adopt Respondent's Narrow Rule

Respondent's effort to prevail in this Court depends entirely on retooling the decision below. Respondent repeatedly asserts that the Federal Circuit's holding applies to "only *the MSPB*," Resp. Br. 20; see *id.* at 1, 15, 20, 23, 31, and insists that the court's holding does not preclude "*federal employers*" from relying on disciplinary actions subject to pending grievances in dealing with recidivist employees. *Id.* at 19. That argument is untenable.

First, and most fundamentally, respondent's narrow rule finds no support in what the Federal Circuit in fact said. Nothing in the Federal Circuit's categorical holding forbidding consideration of prior disciplinary actions subject to pending grievances purports to limit that holding to "*the MSPB*." To the contrary, the relief ordered by the Federal Circuit indicates that its holding governs *federal employers* as well as the MSPB. In remanding the case to the MSPB,

the Federal Circuit gave the Board the option to return the case "to the Postal Service to select a penalty *in light of the precise status of Ms. Gregory's prior disciplinary record.*" Pet. App. 7a-8a (emphasis added).

Subsequent Federal Circuit case law confirms that the decision below did not adopt respondent's narrow rule. In *Blank* v. *Department of the Army*, 247 F.3d 1225, 1230 (2001), the Federal Circuit declined to extend the "rule announced in *Gregory*" to prior disciplinary actions subject to pending EEOC proceedings. In refusing to extend *Gregory*, the *Blank* court explained: "If *an agency* is unable to consider prior disciplinary actions pending before the EEOC, *the agency* would be effectively prohibited from timely implementing progressive disciplinary measures." *Ibid.* (emphasis added). If the "rule announced in *Gregory*" governed "only *the MSPB*" (Resp. Br. 20), its application to prior discipline under review in the EEOC would not limit an agency's ability to implement progressive discipline.

Moreover, respondent's narrow rule runs counter to fundamental tenets of administrative law. It is well-settled that review of an agency action generally must be based on the record *before* the agency at the time of its decision. See, *e.g.*, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971). Under respondent's approach, however, federal employers could consider prior discipline subject to a pending grievance in deciding what discipline to impose, while *the MSPB* could not. To avoid that absurd result—that the Board must base its review on a narrower record than was before the primary decisionmaker—respondent suggests that the Board may consider the full record before the agency once pending grievances have run their course. But a reviewing tribunal generally need not wait for the administrative record to "ripen" based on events taking place long after the agency has made its decision, and the

Federal Circuit's decision cannot be fairly read to require that counterintuitive result.

Respondent's argument that the Federal Circuit adopted a narrow rule is further undercut by her arguments before the Federal Circuit and the MSPB. In the Federal Circuit, respondent argued that her rights were "violated when the government relied upon two unarbitrated cases *as a basis for discharge*." Pet. C.A. Br. 4 (emphasis added). Then, rather than asking the Federal Circuit to vacate the MSPB's decision and remand with instructions that her MSPB appeal be "continued to allow the grievance process concerning the earlier action to run its course" (Resp. Br. 23), respondent requested reversal of the MSPB's decision and that she "be returned to duty." Pet. C.A. Br. 6. Likewise, before the MSPB, respondent never asked the Board to stay her appeal until the pending grievances were resolved, and did not even challenge her prior discipline as erroneous. Pet. App. 37a.

"While it is true that a respondent may defend a judgment on alternative grounds, [this Court] generally do[es] not address arguments that were not the basis for the decision below." *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 379 n.5 (1996); see *Los Angeles Police Dep't* v. *United Reporting Publ'n Corp.*, 528 U.S. 32, 41 (1999); *Bragdon* v. *Abbott*, 524 U.S. 624, 638 (1998). Here, the Federal Circuit not only did not adopt respondent's narrow rule, but respondent asked for relief that is inconsistent with that rule and consistent with a "broad rule" governing both the MSPB and federal employers.[1]

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[1] Respondent's revisionist reading of the Federal Circuit's ruling is also contradicted by her own amici. For example, the American Federation of Government Employees, AFL-CIO (AFGE) "submits that the Federal Circuit's decision properly requires *agencies* to prove * * * the alleged misconduct in prior disciplinary actions that are pending before considering those actions in imposing a penalty in a subsequent adverse action." AFGE Br. 5 (emphasis added).

II. Even If The Federal Circuit Adopted Respondent's Narrow Rule, Its Decision Should Be Reversed

a. The narrow rule hypothesized by respondent is at odds with MSPB practice. For decades, the MSPB has held that agencies may rely on prior disciplinary actions that are subject to pending grievances in determining the penalty for repeated misconduct, but also has permitted employees collaterally to attack such actions before the MSPB when challenging progressive disciplinary measures. See U.S. Br. 21-23 & n.5; *Bolling* v. *Department of the Air Force*, 8 M.S.P.B. 658 (1981). Respondent allocates (at 31-32) scarcely two pages of her brief to discussing that deeply entrenched practice. There, respondent suggests (at 31) that the MSPB's case law does not address "whether *the MSPB itself* may rely * * * on prior disciplinary actions that are still the subject of pending grievance proceedings." Further, respondent hypothesizes that "[i]f the MSPB had confronted the precise issue here presented, it likely would have agreed with the Federal Circuit." *Ibid.*

But the Board's decision *in this case* establishes that the MSPB reviews the challenged disciplinary action under the familiar *Bolling* framework, see Pet. App. 36a-37a, rather than placing the appeal on hold until pending grievances "run [their] course" (Resp. Br. 23). Moreover, as respondent's own amici acknowledge (see Br. for Nat'l Treasury Employees Union (NTEU) 10), this case is by no means the first in which the MSPB has confronted this issue and applied *Bolling* in reviewing an employee's challenge to a removal based on a prior action that was "the subject of pending grievance or arbitration procedures" while the matter was before the MSPB. *Carr* v. *Department of the Air*

Force, 9 M.S.P.B. 714 (1982).[2] The Federal Circuit lacked a sufficient basis to override that administrative practice, whether it did so broadly or by adopting respondent's narrow rule.

b. Respondent's narrow rule also contravenes the CSRA. As noted, respondent's rule would force the MSPB to blind itself to key evidence relied upon by the agency in the decision under review. To avoid that absurd result, respondent suggests that the MSPB must "continue[]" appeals "to allow the grievance process concerning the earlier action to run its course." Resp. Br. 23. As this Court has observed, however, Congress designed the CSRA to *streamline* the administrative appeals process. See *United States* v. *Fausto*, 484 U.S. 439, 445 (1998) (citing S. Rep. No. 969, 95th Cong., 2d Sess. 9 (1978)). The Act accordingly provides that "[i]t shall be the duty of the Board * * * to expedite [its proceedings] to the extent practicable." 5 U.S.C. 7701(i)(4). Respondent's continuance procedure would require the MSPB to do just the opposite.

Respondent suggests (at 29) that "a later-initiated MSPB proceeding will rarely leap-frog an earlier-initiated grievance proceeding," because the "collective bargaining agreement here * * * calls for an arbitration decision in well under one year." That is wishful thinking. As this case illustrates, the grievance-arbitration process can and does take longer than a year to navigate. Indeed, as of April 2000, more than 126,000 grievances against the Postal Service (one of the Nation's largest single employers, with more than 700,000 employees) were awaiting arbitration by some 300 arbitrators. *Report of the USPS Comm'n on a Safe &*

[2] See also, *e.g.*, *Morgan* v. *Department of Def.*, 63 M.S.P.R. 58 (1994); *Taylor* v. *Department of Justice*, 60 M.S.P.R. 686 (1994); *Delgado* v. *Department of the Air Force*, 36 M.S.P.R. 685 (1988); *Freeman* v. *Department of Transp.*, 20 M.S.P.R. 290 (1984).

Secure Workplace 51 (Aug. 2000). More than 20,000 of those grievances were filed by the National Association of Letter Carriers, AFL-CIO (NALC) alone. *Ibid.*[3]

By contrast, MSPB's most recent performance report indicates that on average it took 89 days from the filing of an appeal to the initial decision by an administrative law judge, and 176 days for the full Board to review that decision, if requested by the employee. MSPB, *Fiscal Year 2000 Performance Report* 15-16 (Mar. 31, 2001). That report portrays a much different picture of MSPB efficiency than that painted (at 29) by respondent. Moreover, the MSPB's relative efficiency, compared with the delays that may ensue in the arbitration context, means that respondent's proposed "wait and see" role for the MSPB could substantially delay MSPB appeals and, thus, frustrate Congress's intent that those appeals be heard as expeditiously as practicable.

Neither federal employees nor employers would benefit from a regime in which the validity of major disciplinary actions remains shrouded in doubt for months if not years on end, due to the existence of pending grievances. In many cases, employees would be out of work while the MSPB waits for a grievance to run its course. Federal employers, for their part, might decline to impose progressive disciplinary measures because of the concern that the existence of

[3] Contrary to respondent's suggestion (at 29), the delay in processing the grievances in this case is by no means an aberration. See also, *e.g.*, *In re Arbitration Between USPS & NALC*, Case No. H94N-4H-D 97053759 (So. Regular Discipline Arb. Panel May 10, 2001) (Bajork, Arb.) (denial of grievance filed in September 1996 challenging employee's removal); *In re Arbitration Between USPS & NALC*, Case No. H94N-4H-D 98051824 (Regular Reg'l Arb. Panel Oct. 2, 1999) (Kyler, Arb.) (denial of grievance filed in November 1997 challenging employee's removal); *In re Arbitration Between USPS & NALC*, Case No. H94N-4H-D 96047665 (Regular Reg'l Arb. So. Panel Jan. 19, 1997) (Duda, Arb.) (denial of grievance filed in November 1995 challenging employee's removal).

pending grievances would unduly prolong the appeals process. Indeed, even respondent acknowledges (at 25) that her narrow rule might lead employers to "forfeit reliance on prior disciplinary actions still under review." When it enacted the CSRA, Congress sought to eliminate precisely such disincentives. Cf. *Fausto*, 484 U.S. at 445 (Under the former civil service system, the "general perception was that 'appeals processes were so lengthy and complicated that managers in the civil service often avoided taking disciplinary action' against employees even when it was clearly warranted.") (internal brackets omitted).[4]

c. While cavalierly dismissing the decades-old administrative practice, respondent argues that this Court should affirm because "[t]he narrow rule has long been applied in *arbitration*." Resp. Br. 20 (emphasis added); see *id.* at 2, 24-26. There are several problems with that argument, not the

[4] Respondent claims (at 29) that "the failure of respondent's grievances to proceed to arbitration is due entirely to the Postal Service's own purposeful delay," relying on her own account of non-record events. See also Resp. Br. 9-12. That claim is incorrect. The Postal Service was scheduling hearing dates for each of her grievances when, in December 1997, the union sought, and the Postal Service agreed, to hold the grievances in abeyance pending her MSPB appeal. After the MSPB's initial decision, an arbitration hearing was held in July 1999, during which one grievance was arbitrated. A second hearing for the remaining grievances was set for November 1999. But after the MSPB issued its final decision in October 1999, the union referred the remaining grievances to the national level and then, in February 2000, the union withdrew those grievances without prejudice. The union reasserted those grievances in March 2001, shortly after this Court granted certiorari. But the fact remains that respondent's grievances remained in limbo for a period of nearly 16 months due to the union's own actions. Moreover, if, as respondent now alleges, the Postal Service had sought improperly to delay the resolution of her grievances, the union (in which respondent was a steward) could have sought to compel arbitration by filing suit under 39 U.S.C. 1208, filing an unfair labor practice charge under 39 U.S.C. 1209(a), or filing a national-level grievance.

least of which is that respondent never raised it before the MSPB or the Federal Circuit. Indeed, although respondent asserted in her opposition to certiorari (at 19) that "arbitrators may not sustain disciplinary actions in reliance on unresolved priors," she never argued in that brief that the practice followed by some arbitrators was binding on the MSPB or controlling in this case, and for good reason.

To the extent that substantive rules differ between the MSPB and arbitration contexts, *Cornelius* v. *Nutt*, 472 U.S. 648 (1985), establishes that arbitration rules must yield. In *Cornelius*, this Court held that arbitrators must apply the same substantive law as the MSPB in reviewing agency disciplinary actions that could have been appealed to the Board. See *id.* at 660-662; see also *Westbrook* v. *Department of the Air Force*, 77 M.S.P.R. 149, 155 (1997); *Cockrell* v. *Department of the Air Force*, 58 M.S.P.R. 211, 217 (1993); NTEU Br. 4 (recognizing *Cornelius* rule).

To be sure, arbitrators may apply their own *procedural* rules in processing grievances. Because it bears directly on the reasonableness of an agency's disciplinary action and, indeed, may prove outcome determinative, the *Bolling* rule is substantive in nature and thus binding under *Cornelius*. But if the *Bolling* rule were procedural, it would simply be one of the many factors that a preference-eligible employee must take into account in deciding whether to appeal a major disciplinary action to the MSPB, or challenge it under a negotiated grievance procedure. Respondent's amici suggest that the arbitration rule is more favorable and so the MSPB must apply it to avoid disadvantaging preference eligible employees. NALC Br. 10-11. However, it is hard to see how preference eligible employees are disadvantaged by any difference in the arbitration and MSPB procedures when they can choose between challenging major discipline in the MSPB or by arbitration. Moreover, the choice that respondent confronts is reflected in the Postal Service's agreement

with the NALC (art. 16.9), which provides that when a preference-eligible employee elects to appeal to the MSPB, "the employee thereby waives access to any procedure under the Agreement beyond Step 3 of the grievance-arbitration procedure." Step 3 occurs while a grievance is still before the agency, prior to any arbitration.[5]

d. Respondent claims (at 26) that her narrow rule is more "[s]ensible" than the MSPB's practice, arguing that her rule is necessary to eliminate "strategic gamesmanship." That is precisely the sort of policy argument that Congress committed to the discretion of the MSPB. See U.S. Br. 17-18. The question for the courts is not whether one rule is more "sensible" than the other; rather, it is whether the rule applied by the MSPB is arbitrary and capricious, or otherwise contrary to law. Neither respondent nor her amici has come close to satisfying that threshold.

In any event, respondent's policy concerns (which were not advanced below) are misplaced. There is no reason for this Court to disregard the traditional presumption of administrative regularity (see U.S. Br. 36-37) and attribute illicit motives to federal employers. The *Bolling* framework has been in place for over two decades and none of the horribles identified by respondent (at 27) or her amici

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5 The NALC argues that the Federal Circuit's ruling is consistent with the Postal Reorganization Act (PRA), 39 U.S.C. 101 *et seq.*, claiming that "[t]he PRA allows application of federal civil service law to postal employee removal cases only to the extent not inconsistent with applicable collective bargaining agreements." NALC Br. 5 (citing 39 U.S.C. 1005(a)(1)(A)). Even if that were true in the case of the typical postal employee, the PRA expressly provides that in the case of a preference eligible employee such as respondent the pertinent provisions of the CSRA "shall apply * * * in the same manner and under the same conditions" as they do with respect to other employees covered by the CSRA. 39 U.S.C. 1005(a)(2); see 39 U.S.C. 1005(a)(4)(A). Respondent herself acknowledges (at 3) as much, which may explain why she did not rely on the PRA in the MSPB or the Federal Circuit.

(AFGE Br. 13) have materialized. Furthermore, any incentive that employers might have to "manipulate the system" (Resp. Br. 27) is already dealt with by *Bolling*, which permits employees collaterally to attack any prior disciplinary actions that remain subject to pending grievances. Federal labor laws may offer additional checks on any strategic behavior by federal employers. See note 4, *supra*.

At the same time, respondent simply ignores the other side of the equation. Preventing federal agencies, or the MSPB, from considering prior disciplinary actions subject to pending grievances creates an obvious incentive for recidivist employees (or their unions) to grieve virtually any disciplinary action, and then prolong the proceedings for as long as possible See U.S. Br. 36. Moreover, respondent's narrow rule could have the adverse effect of discouraging employers from relying on prior disciplinary actions in assessing the appropriate penalty for continuing misconduct, thus impeding employers' efforts to employ what all agree is a valuable human resource management tool—progressive discipline. See *id.* at 25-26 & n.7.

III. The Due Process Clause Does Not Demand Rejection Of The Settled Administrative Practice

The established administrative practice provides employees with more than adequate process to satisfy any constitutional or statutory command. See U.S. Br. 37-38. The Federal Circuit did not purport to rest its decision on due process grounds. Respondent likewise has not raised any constitutional argument. Instead, she argues that the many procedural protections afforded by the CSRA and the MSPB's rules "do not render the narrow rule unnecessary," Resp. Br. 34 (initial capitals omitted), and suggests that the existing administrative practice is "unfair[]." Respondent's amici go further and suggest that the settled administrative

practice is unconstitutional. See NALC Br. 8-10; AFGE Br. 6-10. Those arguments should be rejected.

With respect to even minor disciplinary actions, the CSRA guarantees employees notice, the right to representation, an opportunity to respond, and a written statement of the reasons for the disciplinary action. See 5 U.S.C. 7503(b), 7513(b). An employee who is subjected to a major disciplinary action is entitled to those protections, and to appeal the disciplinary action to the MSPB. 5 U.S.C. 7701; U.S. Br. 3-4. In the MSPB, the employer bears the burden of establishing that the adverse action at issue is supported by a preponderance of the evidence. 5 U.S.C. 7701(c)(1)(B). That pre- and post-deprivation process clearly exceeds any constitutional minimum.

The MSPB's *Bolling* rule provides employees with additional protection by allowing them to mount a collateral attack on prior discipline that provides a basis for the current action. See Resp. Br. 35 ("The *Bolling* rule does permit collateral attack of prior disciplines."). Respondent (at 35-36) and her amici (AFGE Br. 9) complain that *Bolling* calls for clear-error review of the prior action when the employee already has had some opportunity to challenge it. But no principle of due process entitles an employee to a de novo standard of collateral review, especially when the employee already has had an opportunity to mount a direct challenge to the prior action before the agency, and has a full opportunity before the MSPB to challenge (de novo) the disciplinary action relying on that prior action. The fact that a non-constitutionally mandated grievance to the prior discipline has not run its full course does not entitle the employee to a de novo standard of collateral review in the MSPB. Moreover, it can hardly be said that the *Bolling* framework for collateral review of prior discipline conflicts with the CSRA, when Congress chose not to provide for *any*

MSPB review of minor disciplinary actions. See U.S. Br. 3 n.1.

Respondent attacks (at 36) the clear-error standard on the ground that most agency actions have been upheld under that standard. But a reversal rate, without more, says little about the adequacy of a standard of review. Indeed, that track record could just as easily be viewed as a sign that prior disciplinary actions are generally well-founded and, thus, ordinarily *reliable* evidence. In any event, respondent is in a poor position to attack the adequacy of *Bolling*'s clear-error standard of collateral review. While she was advised that "she could present argument concerning whether the prior actions were clearly erroneous," respondent "did not set forth any such arguments" in the MSPB, Pet. App. 37a, let alone argue that the MSPB should have considered the validity of her prior disciplinary actions de novo. See U.S. Br. 23. Likewise, respondent's and amici's claim that *Bolling*'s clear-error collateral review conflicts with the CSRA's requirement that employers justify their actions by a preponderance of the evidence is flawed. Nothing in the *Bolling* rule diminishes the employer's burden of proving the major disciplinary action on direct review by a preponderance of the evidence.

Furthermore, as respondent acknowledges (at 37), the MSPB's rules establish a reopening procedure that offers an additional safeguard. See U.S. Br. 22-23. Respondent claims (at 37) that "the MSPB's ability to reopen its decisions provides no solace at all to employees in respondent's predicament." That is an unlikely argument coming from respondent. As respondent acknowledges (at 11), one of her prior actions was overturned by an arbitrator two months before the MSPB issued its final decision in her case. But respondent never presented that evidence to the MSPB while her appeal was pending before the Board, and never

sought to invoke the reopening procedure after her appeal became final. See U.S. Br. 38.

Respondent asserts that once the MSPB affirms a decision to remove an employee, some collective bargaining agreements provide that pending grievances on behalf of the discharged employee should be dismissed, which in turn may limit the utility of the reopening procedure. While it is true that the union's typical practice is to withdraw pending grievances once an agency's removal decision has been affirmed, the reopening procedure still provides significant protection. First, in all major disciplinary actions besides discharges, the reopening procedure provides a full opportunity to bring successful grievances to the attention of the Board, no matter how long the grievance process takes. Second, even for discharge actions, the MSPB rules including the reopening procedure allow employees to alert the Board of successful grievances up until the point that the removal becomes final (and grievances are dropped under a collective bargaining agreement). Thus, the MSPB rules provide protection during a significant interval. Respondent's complaint that that interval is too brief is difficult to reconcile with her claim that arbitration is more efficient than MSPB proceedings.

In any event, even where a discharged employee's collective bargaining agreement limits the effectiveness of the reopening procedure, the employee still has received more than adequate process in challenging her removal. The employee will have received all the procedural protections to which she is entitled under the CSRA in challenging minor disciplinary actions, an opportunity to challenge those actions collaterally under the *Bolling* framework, *and* an

opportunity to challenge the major disciplinary action on appeal in the MSPB and the Federal Circuit.[6]

Although respondent and her amici argue that additional process would be desirable, that is once again precisely the sort of policy consideration that Congress left to the MSPB to weigh against other considerations, such as the virtues of finality with respect to major employment actions and concerns that—as Congress recognized when it enacted the CSRA—overly elaborate procedural rules "often become the refuge of the incompetent employee." S. Rep. No. 969, *supra*, at 3; see U.S. Br. 15-16.

IV. The Question Of The Appropriate Remedy Is Better Left To The Federal Circuit On Remand

Respondent claims (at 39) that "[i]t is not entirely clear what the Postal Service expects from this Court" in the way of relief. To be clear, the Court should decide the question on which it granted certiorari, reverse the judgment below, and remand for further proceedings in the Federal Circuit.

If the Court reverses the Federal Circuit's decision and the erroneous rule on which it is grounded (Pet. App. 7a), then further proceedings would be necessary on remand to determine the appropriate relief. On the one hand, the Federal Circuit could conclude that the MSPB's decision should be affirmed, even though one of respondent's prior

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[6] Any objection to the union's practice of withdrawing grievances pending the MSPB's affirmance of an employee's discharge may be better directed to the collective bargaining arrangement than to the MSPB's rules. Under that agreement, the union mainains pre-separation grievances when the employee's separation is due to resignation, retirement, or death, but not when the employee is discharged for misconduct. See *In re Arbitration Between USPS & NALC*, Case No. H7N-5P-C 1132, at 7 (Nat'l Arb. Panel Mar. 26, 1990) (Mittenthal, Arb.). In any event, if the terms of respondent's collective bargaining agreement limit the effectiveness of the MSPB's procedural protections, the answer is certainly not to declare the MSPB's rules unconstitutional.

actions was set aside by an arbitrator while her appeal was pending before the Board. See U.S. Br. 38-39 & n.13. On the other hand, the Federal Circuit could decide to return this case to the MSPB for further consideration in light of this Court's ruling and the fact that one of respondent's priors was set aside. That determination should be left for the Federal Circuit on remand, after further briefing in light of this Court's decision. Cf., *e.g.*, *Shaw* v. *Murphy*, 121 S. Ct. 1475, 1481 (2001).[7]

As a last-ditch measure, respondent suggests (at 41-46) that the Court should dismiss the writ of certiorari. In doing so, respondent re-airs the same arguments that she made in opposition to certiorari. Those arguments were wrong at certiorari stage, see Cert. Reply Br. 5-9, and remain unavailing. This case presents an ideal vehicle to review the Federal Circuit's decision to scuttle the settled administrative practice. The MSPB relied on that practice in affirming respondent's removal. Pet. App. 36a-37a. The government relied on that practice in defending the MSPB's decision in the Federal Circuit. Gov't C.A. Br. 16; see Cert. Reply Br. 5-6 & n.3. Furthermore, the Federal Circuit's decision rejecting the settled administrative practice undeniably will affect the outcome in this case (see Resp. Br. 46), and, more to the point, will have an enormous effect on the efficiency of the federal civil service system.

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[7] Respondent suggests (at 2, 39) that the Postal Service has conceded that her "removal cannot stand in light of the arbitral decision overturning one of the three prior disciplinary actions in respondent's record." That is incorrect. See U.S. Br. 39 & n.13. Indeed, even respondent acknowledges (at 46) that her removal remains a possibility, though she claims that it is "extremely unlikely." The final determination cannot be made until this Court decides the question presented and, thus, the extent to which respondent's disciplinary record may be considered by the agency.

* * * * *

For the foregoing reasons, and those in our opening brief, the judgment of the Federal Circuit should be reversed.

Respectfully submitted.

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IN THE

United States Supreme Court

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

MARIA A. GREGORY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT OF CONSENT

Both parties have consented to the filing of this brief. Their letters of consent are filed herewith.

INTEREST OF *AMICUS CURIAE* [1]

The National Association of Letter Carriers, AFL-CIO ("NALC") submits this brief *amicus curiae* to bring to the Court's attention relevant matters not likely to be addressed by the parties. In particular, the brief focuses on the extent to which the decision of the court below accords with the policies of the Postal Reorganization Act ("PRA" or "the Act"), 39 U.S.C. §§ 101 *et seq.*, the statute that both governs Petitioner United States Postal Service ("USPS") and its relations with its employees, and that provided Respondent the right to an appeal to the Merit System Protection Board ("MSPB").

NALC is a national labor organization that, under the PRA, *see* 39 U.S.C. § 1203(a), serves as the exclusive bargaining representative of all city letter carriers employed by USPS, including Respondent. *See generally Air Courier Conf. v. American Postal Workers Union*, 498 U.S. 517 (1991). As bargaining representative for over 200,000 postal letter carriers, NALC's principal concern is their terms and conditions of employment, including the procedural rules governing discharge proceedings. In particular, as bargaining representative under the PRA, NALC has an interest in seeing that such procedural rules accord with the policies of the PRA.

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[1] Pursuant to Rule 37(6) of the Court, NALC states that no counsel for a party in this case authored this brief in whole or in part, and no entity, other than NALC, made a monetary contribution to the preparation or submission of the brief.

SUMMARY OF ARGUMENT

The right of preference eligible postal employees like Respondent to appeal a removal to the MSPB arises under the PRA, so MSPB procedures in such removal cases should accord with the policies of the PRA. In enacting the PRA, Congress sought that, whenever possible and appropriate, collectively bargained rules and procedures should govern postal employees. The decision of the court of appeals below furthers that policy by adopting the same procedural rule for postal employees in MSPB cases as is used by labor arbitrators under the NALC-USPS collective bargaining agreement, namely, that prior discipline cannot be considered in a removal case if it has been grieved but not yet arbitrated.

Next, in arguing that discipline its management issues to employees should, pending arbitration, be presumed proper, USPS cites caselaw concerning the acts of government officials. In enacting the PRA, however, Congress deliberately sought to divest USPS management of the mantle of government authority in labor relations, requiring it to bargain with representatives of its employees like a private-sector company. Because the PRA puts USPS on the same plane as a private-sector employer in labor relations matters, no presumption relevant to government action should apply to discipline issued by USPS management.

Finally, by applying the same rule in MSPB cases as applied by labor arbitrators under the NALC-USPS collective bargaining agreement, the court of appeals decision furthers the PRA's policy of protecting the employment rights of veterans. In accordance with 39 U.S.C. § 1005(a)(2), the only postal employees covered by collective bargaining agreements who have the right to appeal a discharge to the MSPB are veterans or employees otherwise deemed "preference eligible," as that term is defined in 5 U.S.C. § 2108(3). Had the court of appeals not required the same favorable procedural rule be applied to preference eligible

USPS employees in MSPB cases as that applied to postal employees under the collective bargaining agreement, it would have put veterans who choose to appeal to the MSPB in a potentially worse position than postal employees who have their cases heard in arbitration, and thus contravened the PRA's veteran protection policy.

ARGUMENT

I. THE COURT BELOW FURTHERED THE POLICIES OF THE PRA BY ADOPTING A RULE CONSISTENT WITH THE COLLECTIVELY BARGAINED PROCEDURE GOVERNING POSTAL EMPLOYEES

As Respondent correctly notes, under the NALC-USPS collective bargaining agreement, labor arbitrators, in reviewing discharge cases, do not consider grieved but not yet arbitrated prior discipline. *See USPS and National Post Office Mail Handlers, Watchmen, Messengers & Group Leaders*, Case No. MC-S-0874-D (1977) (Fasser, Arb.), slip op. at 7 (copy lodged with the Court) (holding, in reversing employee's discharge, that grieved but not yet adjudicated prior discipline "has no standing in this proceeding."); *NALC and USPS*, Case No. E94 N-4E-D 96075418 (1999) (Snow, Arb.), slip op. at 16 (copy lodged with the Court) (citing parties' "past practice of giving unresolved grievances no standing in removal hearings"); *USPS and NALC*, Case No. D90N-4D-D 95076768 (Sickles, Arb.), slip op. at 20 (copy lodged with the Court) (arbitrator will consider case "without reference to the past elements [of discipline], since they have not been resolved and it would be inappropriate to 'hold these matters against the grievant' until there is a final resolution"); *USPS and NALC*, Case No. S1N-3Q-D-26601 (Williams, Arb.), slip op. at 8 (copy lodged with the Court) (arbitrator "cannot consider discipline[ ] which is being adjudicated. If some is reduced or eliminated, it has a definite impact on the past record, progressive discipline, etc.").

The court below applied the same rule to Respondent's MSPB case, namely, that the MSPB cannot consider grieved but not yet arbitrated prior discipline. *See* 212 F.3d 1296, 1300 (Fed. Cir. 2000). By adopting the same rule for MSPB cases as that established through collective bargaining, the court's decision furthers the policies of the PRA.

The policies of the PRA matter in this case because, unlike in other MSPB cases, MSPB cases involving postal employees arise under the PRA. *See Gribcheck v. USPS*, 87 M.S.P.R. 473, 479 (2001); *Hall v. USPS*, 26 M.S.P.R. 233, 236 (1985); *accord Bacashihua v. MSPB*, 811 F.2d 1498, 1501 (Fed. Cir. 1987). Postal employees are generally excluded from the definition of civil service "employee" under 5 U.S.C. § 2105(e). The PRA established USPS as an independent establishment of the executive branch of the federal government, 39 U.S.C. § 201, and structured it like a private-sector enterprise. *See Bacashihua*, 811 F.2d at 1501; *see also Franchise Tax Bd. v. USPS*, 467 U.S. 512, 520, 525 (1984) (in enacting the PRA, Congress "launched [USPS] into the commercial world," so as "to be treated similarly to other self-sustaining commercial ventures"). Congress exempted USPS and its employees from federal civil service law, except as to those "very limited" provisions, *Hall*, 26 M.S.P.R. at 235, that the Act specifically made applicable. *See* 39 U.S.C. § 410(a); *see also Gribcheck*, 87 M.S.P.R. at 477. The PRA further provides that the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, which governs private-sector labor relations, *see id.* § 152(2), also governs postal labor relations. *See* 39 U.S.C. § 1209(a); *see also id.* §§ 1202-04; *Hall*, 26 M.S.P.R. at 235; *Bowen v. USPS*, 459 U.S. 212, 232 (1983) (White, concurring) (noting provision of PRA is parallel to § 301 of Labor-Management Relations Act, 29 U.S.C. §185, which applies in private sector).

At the core of its labor relations provisions, the PRA provides for legally-enforceable collective bargaining

agreements between USPS and the unions that represent postal employees. *See* 39 U.S.C. §§ 1206, 1208(b); *see also Gribcheck*, 87 M.S.P.R. at 480 (noting "the central role that collective bargaining plays under [the PRA's] statutory scheme"). The Act expressly permits such collective bargaining agreements to contain binding arbitration provisions, *id.* § 1206(b), such as those contained in the NALC-USPS contract. *See* Article 15 of 1998-2000 NALC-USPS collective bargaining agreement, available at *www.nalc.org/cau/pdf/agreemnt/na1998.pdf*; *see generally Hall*, 26 M.S.P.R. at 235.

The PRA allows application of federal civil service law to postal employee removal cases only to the extent not inconsistent with applicable collective bargaining agreements. 39 U.S.C. § 1005(a)(1)(A). Because an MSPB appeal is inconsistent with binding arbitration under a collective bargaining agreement, postal employees covered by such an agreement generally have no right to an MSPB appeal. *Winston v. USPS*, 585 F.2d 198, 202-06 (7th Cir. 1978); *Hall*, 26 M.S.P.R. at 236. The PRA provides a narrow exception, however, for employees like Respondent, who are veterans or otherwise deemed "preference eligible" under 5 U.S.C. § 2108(3); such employees may appeal to MSPB. *See* 39 U.S.C. § 1005(a)(2). Thus, a postal employee's right to an MSPB appeal arises entirely from the PRA's grant of such a right to preference eligible USPS employees.

Because MSPB cases involving postal employees arise under the PRA, the procedural rules applied in such cases should accord with the PRA's policies. *See Gribcheck*, 87 M.S.P.R. at 480. As the legislative history of the Act makes clear, one of Congress' central goals in enacting the PRA was to have collectively bargained rules and procedures govern the terms of postal employment. Prior to the PRA, a 1962 executive order gave postal employee unions strictly confined collective bargaining rights while expressly preserving for the

then Post Office Department broad and absolute management authority in key areas of operation. *See* Executive Order No. 10,988, 27 Fed. Reg. 551 (Jan. 17, 1962). A commission appointed by President Johnson to investigate the then deplorable conditions in the Post Office found that "[m]any of the problems" in the area of postal labor relations "stem from [the executive order's] exclusion from bargaining of most items bargainable between management and labor in the private sector." *Towards Postal Excellence: The Report of the President's Commission on Postal Organization* 20 (1968). The presidential commission urged that these limited bargaining rights "be replaced with full collective bargaining over pay, related benefits and other matters now negotiated in the private sector." *Id.* at 59. In 1969, the year following issuance of the commission's report, numerous bills were introduced in Congress to give postal employees full collective bargaining rights, including rights to a binding grievance-arbitration procedure. *See, e.g.*, H.R. 4, 91st Cong. 1st Sess. (1969); H.R. 11750, 91st Cong. 1st Sess. (1969).

Among the witnesses who testified in Congress in support of such bills was then-Postmaster General Winton M. Blount, who strongly endorsed pending legislative proposals to grant postal workers "a statutory right to organize collectively and to bargain collectively with management on all of the matters . . . which their neighbors in private industry have long been able to bargain for." *Postal Modernization: Hearings Before the Senate Comm. on Post Office and Civil Service*, 91st Cong., 1st Sess. 536 (1969). President Nixon echoed this emphasis on collective bargaining when, in a message to Congress, he recommended "[t]otal reform of the nation's postal system" to include

> for the first time in history, true collective bargaining in the postal system. Postal employees in every part of the United States will be given a statutory right to negotiate directly with management over wages and working conditions. A fair and impartial mechanism—with

> provision for binding arbitration—will be established to resolve negotiating impasses and disputes arising under labor agreements.

Message from the President of the United States (May 27, 1969), *reprinted in* 115 Cong. Rec. 13,881-82 (1969).

Congress enacted the PRA following an unprecedented nationwide postal employee strike in March 1970. *See* H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. 3 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3649, 3651. "Events of last March," a House Report on the PRA bill explained,

> however deplorable they may be, have finally established that a basic change in postal labor relations is overdue. Although contemporary labor relations in the private sector of the national economy have not been free of problems, they add up to a triumphant success as compared with those in the Postal Service. Generally speaking, [the PRA bill] would bring postal labor relations within the same structure that exists for nationwide enterprises in the private sector. Rank and file postal employees would, for the first time, have a statutory right to organize collectively and to bargain collectively with management on all of those matters—including wages and hours—which their neighbors in private industry have long been able to bargain for.

Id. at 13-14, 1970 U.S.C.C.A.N. at 3662 (emphasis added).

Representative Udall, a member of the House Post Office and Civil Service Committee and a sponsor of the PRA, explained that the postal employee

> will be able, for the first time, to collectively bargain for his wages, benefits, and working conditions with management. No other Government employee will have such opportunities. With the singular exception of the right to strike, our new postal employee will be identical to his counterpart in the private sector in this respect . . . . We are truly creating a new kind of Federal

> employee . . . giving him collective bargaining—with binding arbitration as his last resort—identical to the private enterprise employee.

116 Cong. Rec. 20,229-30, 27,604-05 (1970).

In sum, a core aim of Congress in enacting the PRA was to improve postal labor relations by establishing a regime of collectively bargained terms of employment for this "new kind of Federal employee." Congress clearly sought that, whenever possible and appropriate, collective bargaining rules and procedures should govern postal employees. Applying a collectively bargained rule to postal employees in MSPB cases, as the court below in effect did, thus furthers the goals of the PRA.

II. UNDER THE PRA, NO PRESUMPTION EXISTS THAT DISCIPLINE ISSUED BY USPS MANAGEMENT IS PROPER

In support of its position that the MSPB be permitted to rely on grieved but not yet arbitrated prior discipline, USPS argues that discipline that its management issues to employees should, pending arbitration, be presumed proper. USPS Brief at 38-39. To support this argument, it cites cases for the proposition that government officials are presumed to "perform their duties properly and in good faith." *Id.* at 39. The flaw in this argument is that when USPS management disciplines a postal employee, it is not acting as the government, but as an employer of an enterprise that Congress sought to structure as closely as possible to a private-sector company.

The legislative history of the PRA indicates that Congress deliberately sought to divest USPS management of governmental status in its labor relations, by requiring it to bargain collectively on an even playing field with the representatives of its employees. As the House Report on the PRA bill explained, it was Congress' intention to "bring

postal labor relations within the same structure that exists for nationwide enterprises in the private sector." H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. at 13, *reprinted in* 1970 U.S.C.C.A.N. at 3662; *see also Winston*, 585 F.2d at 202 (noting bills that led to PRA were intended to "replac[e] the procedures of traditional government labor relations with those of the private sector").

The 1962 executive order that granted postal unions limited collective bargaining rights reserved to the Post Office broad and absolute prerogatives over matters of postal employment. *See* Executive Order 10,988, § 7(2)(a)-(f), 27 Fed. Reg. 551, 554. The PRA reversed this, expressly subordinating management rights to the requirements of collective bargaining agreements. *See* 39 U.S.C. § 1001(e); *see also* H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. at 28, *reprinted in* 1970 U.S.C.C.A.N. at 3677 ("The exercise of these management rights is made subject to the terms of whatever collective bargaining agreements may have been entered into").

During floor debates on the PRA, Senator McGee, chair of the Committee on Post Office and Civil Service, explained Congress' rationale for removing the mantle of government authority from postal management:

> Delivering the mail is simply not in the same category of policymaking and program-development as foreign policy, national defense, housing, highway construction, or health and education assistance to State and local governments. It is an essential, *business-oriented* service. The committee has no intention of establishing any postal system which does not have direct and continuing responsibility to the people and to Congress, but we do believe that its roles can be fulfilled with a greater degree of efficiency if it is *removed from the ordinary channels, administrative controls, and legislative restrictions of other agencies in the executive branch.*

116 Cong. Rec. 21,709 (1970) (emphasis added).

Because the PRA puts USPS management on the same plane as a private-sector employer in labor relations matters, any presumption of the correctness of *government* action has no application to discipline USPS management issues to postal employees.

III. THE DECISION OF THE COURT BELOW FURTHERS THE POLICY OF THE PRA TO PROVIDE ADDITIONAL PROTECTION TO VETERANS

As noted above, labor arbitrators deciding discharge cases under the NALC-USPS collective bargaining agreement do not rely on prior discipline that has been grieved but not yet arbitrated. To allow the MSPB to rely on such prior discipline in removal cases concerning veterans or other preference eligible USPS employees would be to put those veterans who choose to appeal to the MSPB in a potentially worse position than their fellow postal employees whose discharge cases are heard in arbitration. Such a result would be inconsistent with the PRA, a statute in which Congress singled out preference eligibles as having *more*, not less, protection, than other postal employees. *See* 39 U.S.C. § 1005(a)(2) (PRA providing preference eligible postal employees with appeal rights); H.R. Rep. No. 91-1104, 91st Cong., 2d Sess. at 10, *reprinted in* 1970 U.S.C.C.A.N. at 3658 (noting same); 116 Cong. Rec. 22,337 (1970) (Sen. Hartke supporting amendment that became § 1005(a)(2)); *American Postal Workers Union and USPS*, Case No. H7C-3D-D 13422 (1991) (Snow, Arb.) (copy lodged with Court), slip op. at 19 (noting that preference eligible employees are "favored"); *American Postal Workers Union and USPS*, Case No. AB-W-11 (1976) (Gamser, Arb.) (copy lodged with Court), slip op. at 8 (noting preference eligible employee "has been afforded special and unique protection against an adverse action"). In particular, in cases involving the right to appeal discharges, labor arbitrators have rejected results that

would place preference eligible employees in a worse position than other postal employees. *See USPS and NALC*, Case Nos. D90N-4D-D 950003945, 61 (1997) (Snow, Arb.) (copy lodged with Court), slip op. at 14 (rejecting result that would leave preference eligible employees with "fewer rights"); *NALC and USPS*, Case No. NC-W-4391D (1977) (Gamser, Arb.) (copy lodged with Court), slip op. at 15 (rejecting result that would place preference eligible employee "in a more vulnerable position than a non-preference eligible employee"). Because the decision of the court below applied to veterans and other preference eligible USPS employees in MSPB cases the same favorable rule applicable to postal employees under the collective bargaining agreement, it accords with the PRA policy of protecting and promoting the employment rights of veterans.[2]

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[2] In support of its claim that the MSPB should be permitted to rely on grieved but not yet arbitrated prior discipline, USPS argues that, should the prior discipline be reversed in arbitration after the employee's removal is sustained by the MPSB, the employee can move to re-open the MSPB case. USPS Brief at 24. Respondent correctly challenges this argument, as it assumes that following the MSPB decision sustaining the employee's removal, the employee can proceed to arbitrate prior discipline. It is doubtful an employee like Respondent, whose employment is governed by the NALC-USPS collective bargaining agreement, has such a right. A 1990 national-level NALC-USPS arbitration award holds that pre-discharge grievances do not survive after the discharge becomes final. *See USPS v. NALC*, Case No. H7N-5P-C 1132 (1990) (Mittenthal, Arb.) (copy lodged with the Court), slip op. at 7. The collective bargaining agreement carves out an exception to this holding only for *nondisciplinary* grievances. *See* Memorandum of Agreement "Re: Processing of Post-Removal Grievances" in 1998-2001 NALC-USPS collective bargaining agreement, available at *www.nalc.org/cau/pdf/agreemnt/na1998.pdf*, at p.185. Accordingly, while an employee may have the right to seek to re-open an MSPB proceeding if prior discipline is reversed, such a right is meaningless if—as may well be the case with postal employees represented by NALC—the employee has no right to proceed to arbitration to obtain the reversal of the prior discipline.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Federal Circuit should be affirmed.

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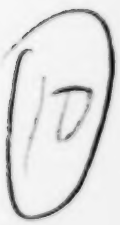

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IN THE

Supreme Court of the United States

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

MARIA A. GREGORY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF FOR *AMICUS CURIAE* NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Merit Systems Protection Board, in reviewing a federal agency's disciplinary action against an employee, may rely on prior disciplinary actions that are the subject of pending grievance proceedings.

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IN THE
Supreme Court of the United States

No. 00-758

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

MARIA A. GREGORY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR *AMICUS CURIAE* NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS* [1]

Amicus Curiae, the National Treasury Employees Union (NTEU), is a federal sector labor organization that is the exclusive collective bargaining representative of approximately 155,000 employees of the federal government nationwide. NTEU and the employees it represents have a vital interest in the resolution of the issue presented in this case: whether the Merit Systems Protection Board (MSPB) has authority to finalize an adverse action that the employing agency has expressly based prior disciplinary actions either overturned by an arbitrator, or subject to being overturned in pending arbitration proceedings.

[1] The parties have consented to the filing of this brief, which was authored in whole by NTEU counsel, and their letters of consent have been lodged with the Clerk of this Court.

STATUTORY BACKGROUND

The issue here is one of statutory construction regarding the complementary and sometimes overlapping roles that the Merit Systems Protection Board (MSPB or Board) and arbitrators play under the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 111 *et seq.* (CSRA or Act). In particular, resolution of this case depends on the proper delineation of statutory authority between the MSPB and arbitrators when reviewing penalties stemming from adverse action taken against employees for the "efficiency of the service," under Chapter 75 of the Act (5 U.S.C. 7503(a), 7513(a)).

Chapter 75 of the Act includes action of the type taken below by petitioner, United States Postal Service, against respondent, Maria A. Gregory, based on alleged misconduct. That statutory chapter covers federal employees with the requisite tenure in the competitive service, as well as certain individuals in the excepted service, including "preference eligibles" like respondent. *See* 5 U.S.C. 7511(a)(1). Adverse actions for misconduct often involve "progressive discipline" such as that imposed by the Postal Service here, where management expressly invokes prior discipline as justification for imposing increasingly harsher penalties for later incidents of alleged misconduct. In this case, the Board's statutory authority to review the validity of respondent's removal from federal service for the last incident intersected with the statutorily sanctioned jurisdiction of arbitrators under a collective bargaining agreement to review charges of prior disciplinary action leading up to that ultimate penalty.

Title VII of the Act, 5 U.S.C. 7701 *et seq.*, requires federal agencies and unions representing agency employees to "negotiate over terms and conditions of employment, unless a bargaining proposal is inconsistent with existing federal law, rule or regulation. 5 U.S.C. 7103(a), 7116, 7117(a). Even

matters specifically reserved to agency management discretion (*e.g.*, the right to suspend or remove employees, 5 U.S.C. 7106(a)(2)(A)), are subject to negotiations concerning procedures that management officials will observe in exercising their authority. 5 U.S.C. 7106(b)(2). In the provision applicable to employees in the competitive service, the CSRA requires that all collective bargaining agreements (CBAs) provide for a grievance procedure and binding arbitration for the resolution of disputes arising under such agreements. 5 U.S.C. 7121 (a) & (b). The union has a statutory right to be present during all grievance proceedings (5 U.S.C. 7121(b)(3)(B)); only the union or the agency may invoke binding arbitration (5 U.S.C. 7121(b)(3)(C)).

The CSRA also contains a comprehensive scheme governing agency personnel actions against competitive service employees. Under that scheme, workers represented by federal unions generally have only one avenue for challenging a "minor adverse action," which includes, for example, a reprimand or suspension of two weeks or less: they may file a grievance under the CBA procedures. 5 U.S.C. 7121(b) and (c).[2] In the grievance process, a higher level of agency management reviews the discipline proposed by lower-level management. These CBA procedures typically consist of two or three "steps," during which the employee challenges the proposed discipline before various levels of management. When disputes remain unresolved at the end of the steps, employees have no further recourse absent consent of their union, which has the option of invoking arbitration to obtain independent review of the disciplinary action. In such proceedings, the arbitrator's award is final and binding on both parties, with only limited

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[2] Two exceptions not applicable to this case permit appeal of a disciplinary action to the MSPB: when the employee alleges protected whistle-blowing or discrimination on the basis of military service. 5 U.S.C. 7121(c)(3).

review by the Federal Labor Relations Authority (FLRA). 5 U.S.C. 7122.

For major adverse actions (removals, suspensions for more than 14 days, reductions in grade or pay, or furloughs for 30 days or less), the Act establishes procedural requirements and gives the employee the option of seeking review before the MSPB. The Board has the duty to review compliance with procedures and ensure that the agency-employer proves, by a preponderance of the evidence, that the action "promotes the efficiency of the service." 5 U.S.C. 1205, 4303 (b)-(d), 7503(a), 7513(a), 7701(a) & (c)(1)(B) and (c)(2). If agency management meets its burden of proving the underlying charges, the Board reviews the agency's choice of penalty for abuse of discretion, with deference to the agency management's prerogative to choose the appropriate discipline. 5 U.S.C. 7701(b)(3). *See Lachance v. Devall,* 178 F.3d 1246, 1255-1258 (Fed.Cir. 1999).

Competitive service employees covered by a collective bargaining agreement have two options when challenging a major adverse action: following the contract grievance arbitration procedure or appealing to the MSPB. 5 U.S.C. 7121(e)(1), 7512, 7513(a). If the employee forgoes MSPB review and the union invokes binding arbitration (5 U.S.C. 7121(b)(3)(C)), the arbitrator is bound to apply the same legal standards as the Board would if the matter had been appealed to it. 5 U.S.C. 7701(c), 7121(e)(2). *Cornelius v. Nutt,* 472 U.S. 653 (1985). The Act provides for judicial review of both MSPB decisions and arbitration awards in adverse action cases "in the same manner and under the same conditions." 5 U.S.C. 7121(f), 7703. Such appeals lie exclusively in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(d).

In sum, the CSRA provides for collective bargaining agreements with arbitration as the means of resolving disputes under those agreements; entrusts arbitrators with

exclusive and final review authority over minor adverse actions, subject to limited review by the FLRA, rather than the MSPB; establishes standards and procedures governing major adverse actions; provides for appeals to the MSPB from such adverse actions; recognizes arbitration as an equivalent alternative appeal route for challenging major adverse actions when employees are covered by collective bargaining agreements; and provides for judicial review of both MSPB and arbitration decisions regarding major adverse action awards in a single court of appeals under the same conditions.

SUMMARY OF ARGUMENT

The Federal Circuit correctly interpreted the Act to prohibit the MSPB from finalizing a major adverse action whose legitimacy depends on the outcome of a pending arbitration proceeding. The CSRA allows an employing agency to impose progressive discipline leading to removal of an employee from federal service based on prior disciplinary actions challenged in arbitration, but the legality of such removal is contingent on the arbitrator's upholding the validity of those previous agency actions. The statutory scheme does not permit an agency to bypass the proceedings to which the statute entrusts review of disciplinary action.

Moreover, the ruling below correctly harmonizes the MSPB's authority with that conferred by statute on federal sector arbitrators. The Board may not vitiate the arbitrator's role by finalizing an employee's removal that is expressly based on prior disciplinary action pending in arbitration. The Board has no statutory authority for the approach it took below, lightening management's burden of proof and substituting its own cursory review of an incomplete administrative record for determinations made by an arbitrator on a full administrative record developed at an evidentiary hearing.

Far from producing the adverse effects imagined by the government, the ruling below best effectuates the overarching statutory goal of promoting efficiency in the federal service. The Federal Circuit's ruling does not preclude management from pursuing, consistent with the Act, appropriate adverse action, while relevant grievance proceedings continue apace in compliance with negotiated deadlines that unions and employees have no incentive or opportunity to manipulate. What the court of appeals' decision does require is that the *Board* defer ruling to avoid the risk of finalizing a removal based on prior discipline that an arbitrator has declared, or may yet declare, invalid.

To permit a removal to become final in these circumstances is at odds with the statutory scheme, promotes inefficiency, and also raises serious due process issues for an improperly terminated employee. Accordingly, as in other situations where the Board abstains from deciding an appeal until another adjudicator rules on a related issue, the proper path is to await the outcome of an arbitration award that will have a direct impact on the MSPB proceeding. Indeed, under the MSPB's own precedent, principles of fundamental fairness prohibit the Board from relying on charges that "have never been proven." *Howard v. Dept. of the Army*, 6 M.S.P.R.205, 206 (1981).

In addition, the government makes the unpersuasive suggestion that due process concerns are insubstantial here because the Board may consider reopening a concluded removal proceeding. This possibility provides too little and comes too late for employees officially removed from federal service for reasons ultimately proven, in ongoing pending proceedings, to be unlawful. Further, the government's reliance on the Board's discretion to reopen proceedings is wholly irrelevant to employees whose adverse action appeals are adjudicated by an arbitrator. Arbitrators have no authority to unilaterally reopen proceedings once an arbitral decision has become final.

ARGUMENT

I. THE RULING BELOW CORRECTLY CONSTRUES THE SCOPE OF THE MSPB'S AUTHORITY OVER ADVERSE ACTION APPEALS WHOSE VALIDITY DEPENDS ON THE OUTCOME OF PENDING GRIEVANCE AND ARBITRATION PROCEEDINGS

A. The Federal Circuit's Decision Does Not Affect Management's Ability to Impose Adverse Action Based on Prior Discipline

Contrary to the expansive interpretation upon which the government bases its entire brief, the ruling below does not rewrite the rules governing management's ability to remove an employee from the workplace promptly after an alleged incident of misconduct. Rather, the decision simply interprets the MSPB's statutory authority to *finalize* such a removal when its validity depends on the outcome of pending arbitration proceedings.

Read properly, the Federal Circuit's ruling does not preclude management from taking action on the basis of prior disciplinary actions, even when they are challenged in an ongoing grievance proceeding. More specifically, nothing in the ruling below restricts management's statutory prerogative to impose discipline without delay, once the employee is afforded the procedural protections prescribed by the Act. *See* 5 U.S.C. 7503, 7513(b), 7532. The court's decision is instead aimed at the propriety of the *Board's* reliance on challenged prior disciplinary history.[3] That the agency is not

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[3] That the court of appeals was focused on the Board's, rather than management's, reliance on prior discipline is made clear by the following statement (Pet. App. 7a; emphasis supplied):

> Here, as we noted above, *the Board (and, it appears, the Postal Service)* used Mrs. Gregory's prior disciplinary history as a primary factor in determining the reasonableness of the penalty. Because

hand-cuffed as the government suggests (Pet. Br. 32-33; 40) is further made clear by the fact that the statute does not give employees a right to obtain a stay of the type of adverse action at issue in this case.[4] Thus, under the statutory scheme left undisturbed by the ruling below, an employee's discipline commences immediately upon completion of pre-discipline hearing rights, which are not at issue in this case.

B. The Ruling Below Properly Interprets the MSPB's Statutory Authority, As Balanced Against the Complementary Jurisdiction of Arbitrators

As the court of appeals noted, its treatment of disciplinary actions under challenge in ongoing proceedings is rooted in the Board's own precedent regarding progressive discipline based on prior penalties (Pet. App. 7a). In the MSPB's own words, "fundamental fairness requires that the Board not rely on charges which have never been proven." *Howard v. Dept. of the Army*, 6 M.S.P.R. at 206. Similarly, the Board has ruled that an agency may not justify a penalty determination grounded on a prior discipline reversed in grievance proceedings. *Jones v. Dept of the Air Force*, 24 M.S.P.R. 429, 431 (1984). Indeed, the MSPB must take this position to avoid a direct conflict with the Federal Labor Relations Authority, which has exclusive statutory authority to review arbitration decisions addressing minor adverse action. The FLRA has made it clear that an agency commits a statutory

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those prior actions that were the subject of on-going grievance proceedings could not be used, *the Board* abused its discretion in relying upon them. Accordingly, *the Board's* determination that the penalty of removal was reasonable must be set aside.

[4] Although a union may negotiate stay provisions, the CSRA itself provides for a stay only in limited circumstances, not pertinent here: on request by an employee in whistleblower situations, and on request by the Office of Special Counsel where there is an alleged prohibited personnel. *See* 5 U.S.C. 1221(c)(1); 1214(b)(1)(A)(i).

unfair labor practice if it continues to rely on prior disciplinary action reversed by an arbitrator, as justification for progressive discipline in later cases. *American Federation of Government Employees, Local* 2369, 23 F.L.R.A. 304 (1986); *U.S. Army Health Clinic, Fort Kitchie, MD*, 9 F.L.R.A. 935 (1982).

Notwithstanding this precedent, the Board's approach would finalize adverse actions based on charges that an arbitrator could well invalidate after a hearing, just as happened in respondent's case. Such an approach conflicts with an important role that Congress assigned the Board: ensuring that an agency taking adverse action against employees would provide "the specific reasons therefore." 5 U.S.C. 7513(b)(4). Thus, the Act contemplates that the Board ascertain, upon review, that there be a "precise correspondence" between the discipline at issue and the agency's specific justification for imposing it. *Lachance v. Devall*, 178 F.3d 1246, 1258 (Fed. Cir. 1999). The Board has no means of ensuring this requisite correspondence, however, where an agency's justification for a penalty is a prior disciplinary record being challenged in other proceedings. Only upon completion of grievance and arbitration challenges to prior charges can the Board fulfill its statutory obligation to scrutinize the agency's "specific reasons" for imposing the progressive discipline based on those earlier disciplines.[5]

The Federal Circuit's ruling leaves undisturbed the Board's seminal decision regarding the scope of its review of prior disciplinary actions used by an agency to justify the penalty

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[5] The decision leaves intact the Board's list of factors that management must balance in setting a penalty. Demonstrating how crucial it is for prior discipline to be justified, three of the twelve *Douglas* factors relate to priors: The first includes whether the current offense was "frequently repeated"; the third is "the employee's past disciplinary record"; and the tenth is the "potential for the employee's rehabilitation." *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

of removal. *See Bolling v. Dept. of Air Force,* 8 M.S.P.R. 335 (1981). Under *Bolling*, where the Board reviewed a removal decision based on prior discipline, the Board determined that it would review "the documentary record of the past action," including "the record of any agency administrative proceeding held in connection with the action." The Board did so as part of a process to "determine the validity of that action as one of the reasons for the current action." *Id.* at 338. The Board explained that management could justify an adverse action based on prior discipline so long as the earlier action is a "matter of record," and the Board can verify that the employee received the minimum procedural protection of written notification of charges and review before a different agency authority than the manager who proposed them. If these basic criteria are met, the Board upholds the prior discipline unless "clearly erroneous," leaving the Board with a "definite and firm conviction that a mistake has been committed." *Id.* at 339 (citations omitted).

The *Bolling* record comprised a *complete* administrative record concerning the prior discipline, thus affording a reasonable opportunity for the Board to determine the validity of an earlier disciplinary action. The MSPB has, however, expanded application of *Bolling* to cases, such as the instant one, involving direct challenges to prior charges still being scrutinized during grievance or arbitration. *See, e.g., Freeman v. Dept. of Transp.*, 20 M.S.P.R. 290 (1984); *Carr v. Dept. of the Air Force,* 9 M.S.P.R. 714 (1982). In these cases, the Board extended, in conclusory fashion, the cursory *Bolling* review to cases where the administrative record is *incomplete* and lacks essential information about prior disciplinary action. This the Board did without any attempt to explain the inherent conflict with the *Bolling* framework, which had assumed review of a complete administrative record that allowed the accurate assessment of the "validity" of prior discipline.

The Board had no legal justification for extending *Bolling* standards—which were designed as minimum safeguards for employees making collateral attacks on final discipline—to undermine statutorily granted grievance and arbitration rights of employees who are directly challenging prior discipline. It was arguably appropriate to assume the validity of prior discipline in the original *Bolling* context, where the employee made a belated collateral attack and "did not grieve or otherwise contest any of the previous disciplinary actions." *Bolling*, 9 M.S.P.R. at 340. Where grievance and arbitration rights provided by statute are invoked, however, the Act does not allow the Board to substitute its own rubber-stamp review of the same challenged adverse actions and bestow the deferential "clearly erroneous" standard to management's finding of employee misconduct.[6]

On the contrary, where personnel actions are challenged before an arbitrator or the MSPB, the Act requires management to justify its decision by a "preponderance of the evidence." 5 U.S.C. 7701(c)(1)(B) and 7121(e)(2). Given this burden of proof, it is particularly appropriate that federal arbitrators, similar to their private sector counterparts, refuse to consider prior discipline while it is under review in pending grievance proceedings or before another arbitrator.

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[6] The Board routinely upholds the validity of management's prior disciplinary actions as not "clearly erroneous." *See, e.g., Taylor v. Department of Justice*, 60 M.S.P.R. 686, 689-90 (1994); *Delgado v. Dept. of the Air Force*, 36 M.S.P.R. 685, 689 (1988); *Morgan v. Department of* Justice, 63 M.S.P.R. 58, 61 (1994); *Rewald v. U.S. Postal Service*, 34 M.S.P.R. 13, 16 (1987); *Hubbard v. U.S. Postal Service*, 32 MSPR 505, 508-09 (1987). We have located only one instance in which the Board has overturned management's prior disciplinary action under this highly deferential standard: in a unique case where the Board allowed the U.S. Postal Service to rely on one prior discipline, and merely prevented its reliance on a second penalty for the same incident of misconduct, which would have been a clear violation of law. *Eichner v. U.S. Postal Service*, 83 M.S.P.R. 202, 210 (1999).

Compare *Metal Trades Council*, 87 FLRR 2-1497, LAIRS 18045 (1987) (earlier "suspension grievance having yet to be finalized leaves this arbitrator no alternative but to disregard its effect and impact on rendering a decision" regarding validity of the federal employee's ultimate removal) with *In re Arbitration between Island Creek Coal Co. and UMW*, 1996 WL 607192 (Case No. 93-23-96-06) (March 15, 1996) (earlier suspension of private-sector employee that was pending before another arbitrator "cannot be held against the Grievant" because "there is no way of determining at this point whether or not those charges against the Grievant are valid").

Where the agency-employer chooses to base a major adverse action on prior discipline, the Board's review, to be consistent with the statutory scheme, must necessarily await resolution of any pending statutorily sanctioned challenges to those priors. As discussed, the CSRA gives arbitrators and the FLRA, not the Board, statutory authority to determine the validity of minor adverse actions like respondent's three prior disciplines. Until arbitrators resolve pending challenges to such earlier discipline, by deciding whether the agency justified its action by a preponderance of the evidence, the Board simply cannot fulfill its statutory duty of ensuring the validity of resulting major adverse action.

C. The Ruling Below Promotes Efficiency.

The Federal Circuit's opinion has limited impact on the Board's processes and merely ensures that it handle progressive discipline in the most efficient matter. As evidenced by initial decisions issued in the wake of the appellate court's opinion, the MSPB can proceed to finalize progressive discipline without delay where management has provided adequate justification that does not rely on prior discipline still being challenged elsewhere. *See, e.g., Morales v. Dept. of the Navy*, 100 F.M.S.R. 84248 (2000); *Pride v. U.S. Postal Service*, 100 F.M.S.R. 84436 (2000); *Rios v.*

Dept. of Veterans Affairs, 100 F.M.S.R. 84209 (2000); and *Fenwick v. Dept. of Veterans Affairs*, 100 F.M.S.R. 84542 (2000). The Federal Circuit's decision only affects the MSPB in those relatively few cases involving adverse action based squarely on prior discipline that is still pending at the grievance or arbitration stage when the Board is ready to exercise its review. Such cases arise only when management has expressly invoked a specific prior discipline in the notice of proposed action regarding a later incident of alleged misconduct. *See Harris v. Dept. of Transp.*, 29 M.S.P.R. 430 (1985) (agency could not rely on a prior discipline that it failed to reference in the proposal notice for the action under review). In those instances, the statutory scheme simply requires the MSPB to defer finalizing the dependant adverse action until completion of the grievance and arbitration challenges. This interpretation not only harmonizes the Board's role with that of arbitrators, but it is the most efficient and fair way for the Board to proceed.

Given the posture of the progressive discipline chosen by the agency-employer, the only reasonable approach—and the only one consistent with the statutory scheme—is for the Board to defer review of an employee's removal pending the outcome of arbitration proceedings that will necessarily affect the validity of its own ruling. The Board has long recognized its statutory authority to abstain from deciding an appeal and defer to another adjudicator reviewing an identical issue. *See, e.g., Key v. U.S. Postal Service*, 31 M.S.P.R. 197, 200 (1986) (Board abstained and deferred to a district court's ruling on an EEO issue and ultimately dismissed a petition for enforcement in light of a settlement in the court proceeding). As the MSPB has recently explained, its administrative judges have broad discretion to grant continuances or even dismiss appeals without prejudice to refiling when a continuance threatens to be too lengthy or indefinite. *Milner v. Dept. of Justice*, 87 M.S.P.R. 660, 666 (2001). Administrative judges, in fact, have often found good cause to defer to

pending arbitration proceedings. *See Figueroa v. Dept. of Treasury*, 98 F.M.S.R. 84655 (1998); *Hall v. Tennessee Valley Authority*, 96 F.M.S.R. 80050 (1997) (dismissals without prejudice to refiling after resolution of arbitration); *Thomas v. U.S. Postal Service*, 97 F.M.S.R. 82584 (1997) (even if Board had jurisdiction, it would abstain and defer in light of pending arbitration on same issue). Particularly given this precedent, there is no justification for the Board forging ahead to finalize an employee's adverse action based on prior discipline being reviewed in ongoing grievance proceedings, rather than awaiting a ruling by the arbitrator entrusted with exclusive statutory jurisdiction over such matters.

Contrary to the government's contention (Pet. Br. 34-36), the lower court's ruling does not encourage employees to prolong grievance proceedings to protect themselves against possible discipline in the future. Because disciplined employees have no means of obtaining a stay of suspensions or removals, they have every incentive to pursue grievance and arbitration as expeditiously as possible, in the hope of being put back on the job and recovering back pay. The government wrongly suggests that grievance proceedings are open-ended and subject to mischievous manipulation by employees. By statutory mandate, any negotiated grievance procedure must "provide for expeditious processing." 5 U.S.C. 7121(b)(1)(B). Management and unions thus negotiate specific deadlines, which can be extended only by agreement of the parties, placing outer limits on the completion of the employee's role.

As delineated in NTEU's own collective bargaining agreements, grievance procedures are designed to be expeditious, starting with two or three "steps" involving meetings or exchanges of written communications designed to resolve disputes without resort to arbitration. Typical time frames for accomplishment of all pre-arbitration grievance steps range from 60 to 85 days, half of which are allotted to

the agency. *See, e.g.*, National Agreement Between Internal Revenue Service and NTEU, National Office Regional and Districts (NORD) V Art. 38 (Disciplinary Actions), Art. 39 (Adverse Actions) and Art. 41 (Employee Grievance Procedure), *available at http://www.nteu47.org*. Management thus retains substantial control over the length of any given grievance and arbitration proceeding. Not only can it refuse to grant extensions of time to the union, but management can also substantially reduce the time necessary to finish the grievance steps, merely by taking less than the full time available for meeting its own deadlines.

Nor would the ruling below increase the number or length of arbitrations. Employees themselves have no statutory right either to invoke arbitration on their own, or to insist that a union invoke arbitration on their behalf. *See* 5 U.S.C. 7121(b)(1)(C)(iii) (authorizing employees' exclusive representative to invoke arbitration). Unions lack the motivation and means to exercise their statutory invocation rights frivolously. Invoking meritless arbitrations for the purpose of protracting grievance proceedings would likely demonstrate bad faith and might constitute a statutory unfair labor practice. *See* 5 U.S.C. 7116 (b) (5). Finally, meretricious arbitration is something that unions can ill afford to do. Compensation to arbitrators and investment of considerable staff time create a serious drain on limited union funds and erect a realistic barrier to unwarranted invocations. *See Schneider Moving & Storage Co., v. Robbins*, 466 U.S. 364, 376 (1984); *Vaca v. Sipes*, 386 U.S. 171, 191 (1967) (employees cannot force their unions to invoke arbitration, which is the "most costly and time-consuming step in the grievance procedures.")

The Federal Circuit has recently clarified that the ruling in this case did not require the Board to stay its hand for resolution of disciplinary actions being reviewed by the EEOC for complaints of discrimination. *Blank v. Dept. of the*

Army, 247 F.3d 1225 (2001).[7] The ruling below therefore requires that the Board defer only to the "expeditious processing" of grievance and arbitration decisions. *See* 5 U.S.C. 7121(b)(1)(B). Under NTEU's collective bargaining agreements, for example, the union has no more than 20 or 30 days to invoke arbitration after conclusion of the grievance steps. Once the parties choose an arbitrator under the contract's pre-arranged procedures, a hearing usually takes only a day. *See* Cindy Cole Ettingoff & Gregory Powell, *Alternative Dispute Resolution Symposium: Use of Alternative Dispute Resolution in Employment-Related Disputes*, U. of Mem. L. Rev. 1131, 1136 (Spring 1996) ("arbitration hearings typically last one day"); Paul Alan Levy, *Deferral and the Dissident*, U. Mich. J.L.Ref. 479, 557 (Spring and Summer 1991) ("the average labor arbitration hearing lasts one day"). In addition, the agency and union may impose deadlines on the arbitrator, requiring decisions within a limited amount of time after conclusion of the hearing. *See generally*, Elkouri & Elkouri, How Arbitration Works at 379-381 (5th Ed.). *See also AFGE, Local 2029*, 48 FLRA 95 (1993) (tardy arbitration award stands where complaining party failed to object before the ruling).

Contrary to the government's suggestion (Pet. Br. 33-36), the unsynchronized review of progressive discipline presented in this case will remain a rare occurrence, particularly given the prevalent practice of "bundling" minor adverse actions. When management takes a series of disciplinary actions against an individual employee within a short timeframe, the parties typically agree to consolidate grievances

[7] The MSPB recently read the Federal Circuit's *Blank v. Dept. of the Army* ruling broadly, allowing management to rely on disciplinary action being challenged on discrimination grounds in a grievance proceeding pending at the employing-agency level. *Powell v. Dept. of Defense*, 2001 MSPB LEXIS 508 (MSPB Docket No. AT-0752-00-0746-I-1) (June 7, 2001).

into a single proceeding. *See, e.g., AFGE, Local 215 and Dept. of Health and Human Svcs., Social Security Admin, Office of Hearings and Appeals*, 93 FLRR 2-1373 (1993). This efficient practice avoids the need for multiple proceedings and allows the arbitrator to hear all relevant evidence regarding the full range of disciplinary actions, permitting him to rule on the validity of all challenged adverse actions.

The instant case is extremely atypical in terms of the long period of time in which two of the minor adverse actions against grievant have remained unresolved by an arbitrator. The only explanation in the record is respondent's assertion that the lack of arbitral resolution stems from management's own tactics: securing dismissals of scheduled arbitrations on the grounds that the Board had already finalized respondent's removal from service. *See* Resp. Br. 9-11. If so, of course, the government must not be heard to complain about the lack of resolution of the merits of the underlying adverse actions (Pet. Br. 34). In any event, the delays here are extraordinary and in no way indicative of the normal speed of grievance and arbitration proceedings.

D. The Board's Position Violates Its Own Principle of Fundamental Fairness.

The Board's practice of finalizing employee removals, notwithstanding the pendency of highly relevant pending adverse action proceedings, directly conflicts with its own stated rule against reliance on unproven charges out of concern for "fundamental fairness." *Howard v. Dept. of the Army*, 6 M.S.B.R. at 206. As in other cases where a party's statutory interpretation raises constitutional concerns, the Court should reject the Board's construction to avoid serious due process issues. *See Jones v. United States*, 526 U.S. 227, 239 (1999); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("where a statute is susceptible of two constructions, by one of which

grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.")

Final termination of a government employee is a serious deprivation of property.[8] This Court has "frequently recognized the severity of depriving a person of the means of livelihood." *Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 543 (1985) (citations omitted). The removed employee may be without a paycheck indefinitely, without a source of income or means of making financial plans. Being removed for cause may make it difficult, if not impossible, to find other employment, in addition to creating intangible harms, including loss of self-esteem. The Board should not be allowed to forge ahead to finalize a termination based on prior discipline that may prove invalid.

Tacitly acknowledging that the Board's position can lead to the wrongful removal of employees, the government maintains that this unfairness is alleviated because employees can file a motion requesting the Board to reopen proceedings, should subsequent arbitrations undermine the justification for their removal from service. Pet. Br. 33. This approach obviously provides the employee with no protection at all if, as apparently happened here, the agency-employer cuts off ongoing arbitrations on the basis of the Board's decision to finalize the employee's removal from federal service. *See supra* at 17. Even where management does not interrupt the grievance and arbitration process, reliance on the Board's willingness to exercise its discretion provides insufficient protection to the unlawfully discharged employee, who should not bear the burden of trying to reopen proceedings.

[8] Public employees such as respondent, "who can be discharged only for cause have a constitutionally protected property interest" in their jobs and cannot be fired without due process. *Gilbert v. Homar,* 520 U.S. 924, 930 (1997) (citations omitted). *See also Lachance v. Erickson,* 522 U.S. 262, 266 (1998).

See Milner v. Dept. of Justice, 87 M.S.P.R. at 666; *Thomas v. Dept. of Veterans Affairs,* 51 M.S.P.R. 218, 221 (1991) (continuance is preferred option, where employee objects to dismissal of an appeal without prejudice to refiling, in part because employee "should not face the additional burden of refiling or otherwise reinstating his appeal."). Instead, management must bear the affirmative burden of bringing progressive discipline into compliance with an arbitration ruling overturning prior discipline, as it must do to avoid committing an unfair labor practice under FLRA precedent. *See supra* at 8-9.

Moreover, the government's effort to avoid due process concerns by relying on the Board's authority to reopen a concluded removal proceeding is inapposite for those many employees who are covered by a CBA and have chosen the statutorily sanctioned grievance-arbitration procedure to appeal an adverse action. Reopening proceedings regarding minor or major adverse actions is not an option for federal sector arbitrators.[9] Unlike the Board, arbitrators have no authority to reconsider their rulings upon the request of a single party. *Dept. of Defense, Air Force, Seymour Johnson AFB and NAGE Local R5-188,* 56 FLRA 249 (2000); *Oversees Federation of Teachers, AFT and DOD Dependents School,* 32 FLRA 410 (1988). After issuing a final award, all power of the arbitrator has been exhausted, unless the parties jointly confer new authority; a request for reconsideration by only one party has no effect. *See Devine v. White,* 697 F.2d 421, 433 (D.C. Cir. 1983). In other words, management could effectively block any attempt by an employee to reopen arbitration proceedings whose validity is called into question by another arbitral ruling.

[9] As noted *supra* at 4, the Court's resolution of the question presented in the instant case would bind arbitrators, as well as the MSPB. *See* 5 U.S.C. 7701(c), 7121(e)(2).

Thus, the government's reliance on the Board's authority to reopen concluded proceedings only compounds—and certainly does not cure—the fundamental unfairness of allowing employees to be terminated by relying on charges ultimately proven in pending ongoing proceedings to have been unfounded. Employees, particularly those covered by a CBA, could well prevail in proceedings challenging earlier discipline only to be left without any recourse as to resulting terminations. Such a result is untenable and cannot be squared with the due process concerns the Board purportedly wishes to safeguard.

CONCLUSION

For these reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE,

Petitioner,

v.

MARIA A. GREGORY,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association ("NELA") is a voluntary membership organization of over 3,000 attorneys who regularly represent employees in labor, employment, and civil rights disputes. NELA is one of the largest organizations in the United States whose members litigate and counsel individuals, employees, and applicants for employment on claims arising out of the workplace. NELA has participated as *amicus curiae* in numerous employment cases before the state and federal appellate courts as well as the United States Supreme Court. Recent cases before this court include *Pollard v. E.I. du Pont de Nemours & Co.*, No. 00-763 (U.S. June 4, 2001); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097 (2000); *West v. Gibson*, 527 U.S. 212, 119 S. Ct. 1906 (1999); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 119 S. Ct. 2118 (1999); and *Haddle v. Garrison*, 525 U.S. 121, 119 S. Ct. 489 (1998). NELA has a compelling interest in ensuring that the goals of the Civil Service Reform Act of 1978 are fully realized. Because of the need for federal employees to be able to effectively challenge prior discipline before it can be used to enhance the penalty in subsequent disciplinary actions, NELA submits this brief to protect the interests of its members' clients by ensuring that they receive fair treatment by their employer, the United States Government.

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[1] Petitioner and Respondent have consented to the filing of this brief *amicus curiae*. The consents have been filed with the Clerk of this Court. No part of the attached brief has been authored by counsel for either party. No persons other than the *amicus curiae*, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF THE ARGUMENT

This case presents the Court with an opportunity to clarify whether the Merit Systems Protection Board (MSPB) can rely upon prior disciplinary actions with pending grievances to enhance the penalty in a subsequent case. *Amicus* proposes that the Court accept the position of the Federal Circuit Court of Appeals prohibiting such consideration of ". . . prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." *Gregory v. United States Postal Serv.*, 212 F.3d 1296, 1300 (Fed. Cir. 2000). This requirement, which prohibits the MSPB, but not federal agencies, from continuing to rely upon challenged disciplinary actions, is in accord with the remedial purpose Congress intended when it passed the Civil Service Reform Act of 1978. The MSPB's prior position is also contrary to concepts of procedural due process and ". . . risk[s] harming the legitimacy of the reasonable penalty analysis, by allowing the use of unreliable evidence (the ongoing prior disciplinary actions) to support an agency action." *Id.* at 1300.

Amicus suggests that the Court adopt the rationale enunciated by the Federal Circuit below that the MSPB abused its jurisdiction in relying upon prior actions that were the subject of ongoing grievance procedures. Therefore, the Board's determination that the penalty of removal was reasonable should be set aside. However, agencies can still rely upon prior discipline when taking the next action as long as they continue to process the prior grievances to arbitration. In the meanwhile, the employee should be able to hold in abeyance his appeal to the MSPB or the arbitrator on the subsequent adverse action. If a final decision is rendered in favor of the agency, it can then rely upon the prior action to enhance the penalty rather than placing the difficult burden on employees who have already been removed, demoted, or subjected to lengthy suspensions of 15

days or more. If the final decision is rendered on behalf of the employee, the agency will have a great incentive to settle to avoid having its penalty mitigated, thus reducing litigation. The increased burden will encourage federal agencies to expeditiously process the prior pending cases rather than delay the proceedings and then claim that the former employees are no longer covered by the grievance-arbitration procedures.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS BELOW WAS CORRECT IN FINDING THAT THE MSPB MAY NOT GIVE CONSIDERATION TO PRIOR DISCIPLINARY ACTIONS THAT ARE THE SUBJECT OF ONGOING PROCEEDINGS CHALLENGING THEIR MERITS.

The MSPB developed its theory that appellants only have a limited right to contest prior disciplinary actions in the case of *Bolling v. Dep't of the Air Force*, 9 M.S.P.R. 335 (1981). The Board distinguished between two types of situations. The first is where an employee was 1. previously informed of the action in writing, 2. was given an opportunity to dispute the merits of the action to a different authority, and 3. the action was made a matter of record—in that case the record of the prior disciplinary action will be reviewed and upheld ". . . unless, upon review, the agency or the Commission determines that the disciplinary action was unreasonable, arbitrary, or capricious." *Id.* at 339. This does not give the employee the right to ". . . 'hash over' the record of the past action in his hearing on the current action." *Id.* Alternatively, if the employee does not dispute the prior action, ". . . only the occurrence of that action need be verified." *Id.* Thus the practice of the former Civil Service Commission, predecessor to the Board, was ". . . to give a challenged past record a full, *de novo* review

if the three criteria were not met, but a limited review of the record if they were." *Id.*

The Board decided to follow the Commission's approach, noting that "[t]he Reform Act effected no substantive changes in the area of the proper review of challenged prior disciplinary actions," citing *Howard v. Dep't of the Army*, 6 M.S.P.R. 205, 205-07 (1981). *Id.* In determining that it struck the correct balance, the Board stated that ". . . an appellant is not allowed to relitigate issues that either were, or could have been, thoroughly litigated previously." *Id.* at 340. However, the Board's analysis is fundamentally flawed in two aspects: there is no requirement that the employee must have the prior disciplinary action reviewed by a different authority from the one that took the action, 5 U.S.C. § 7513; 5 C.F.R. § 752.404(c); and the employee is not allowed to thoroughly litigate prior disciplinary actions before they could be used as a basis to enhance the penalty in a subsequent case. *See Carr v. Dep't of the Air Force*, 10 M.S.P.R. 498, 500 (1982) (holding that a pending grievance only entitled employee to a determination ". . . of whether that action was 'clearly erroneous.'"); *accord, Jeffers v. Dep't of Veterans Affairs*, 40 M.S.P.R. 567, 570 n.4 (1989).

Moreover, "[r]are are the cases finding past discipline clearly erroneous as opposed to, for example, time barred." Peter B. Broida, *A Guide to Merit Systems Protection Board Law & Practice* 1540 (Dewey Publications 2001) [hereinafter *A Guide*]. Thus, notwithstanding the petitioner's reliance on the *Bolling* rule governing the consideration of prior disciplinary actions for providing adequate procedural safeguards, in practice it has not worked. Brief for the Petitioner at 29-30 [hereinafter Petitioner's Brief]. Furthermore, while employees are only entitled to limited review of the records of prior actions where all three criteria were met, the Board, in formulating its rule, still

referred to the fact that ". . . appellant did not grieve or otherwise contest any of the prior disciplinary actions . . . ." *Bolling*, 9 M.S.P.R. at 340. Nevertheless, the Board rejected Maria Gregory's petition for review below, ". . . holding that the penalty of removal was justified by Ms. Gregory's prior disciplinary record, part of which was the subject of then-current administrative proceedings." *Gregory*, 212 F.3d at 1298.

Therefore, the Board has been only giving lip service to the notion that federal employees are entitled to litigate prior disciplinary actions before that discipline could be used to support the enhanced penalty in a subsequent disciplinary action. The Federal Circuit properly addressed this inherent inconsistency in holding ". . . as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits." *Id.* at 1300. The court went on to correctly note that "[t]o conclude otherwise would risk harming the legitimacy of the reasonable penalty analysis, by allowing the use of unreliable evidence (the ongoing prior disciplinary actions) to support an agency action." *Id.* However, in *Blank v. Dep't of the Army*, 247 F.3d 1225 (Fed. Cir. 2001), the court held that the same principle does not apply to collateral challenges to disciplinary actions in discrimination cases pending before the Equal Employment Opportunity Commission (EEOC). Citing the need for finality, the court noted the possibility of long time delays in obtaining final EEOC decisions. This is a reasonable balancing of the equities between the need for expeditious discipline of federal employees and the fundamental fairness inherent in waiting for an independent determination of pending grievances before relying upon a prior disciplinary action.

The U.S. Postal Service argues that the Federal Circuit had no right to reverse the Board's decision below because:

> Both longstanding administrative practice and common sense support the MSPB's rule that agencies may consider an employee's disciplinary record—without regard to pending grievances—in calibrating the discipline for subsequent misconduct.

Petitioner's Brief at 11. *Amicus* concedes that there was a "longstanding administrative practice," but strongly disagrees that it was based on "common sense." As noted *supra,* the underlying rationale for the Board's administrative practice was fundamentally flawed. While the petitioner is correct that the Board can reopen an agency decision "after it has affirmed an agency decision relying upon that action," such a review is discretionary with the Board which has no obligation to reopen such a case, especially after a long period of time has elapsed. *See id.* at 12 (emphasis added); 5 C.F.R. § 1201.118. "There is little law on the effect of reversal of past discipline upon a currently sustained charge." Peter B. Broida, *A Guide* 1541 (2001). As a practical matter, it is very difficult to get the Board to grant petitions to reopen based on new evidence of reversals of past discipline, and only sophisticated employees or those represented by experienced counsel are likely to be even aware of such a procedure. "Compared to the number of cases annually decided by the Board through PFR, there are very few cases that are reopened under Section 1201.118." *Id.* at 984.

Amicus also concedes that recent disciplinary actions are relevant in determining the penalty for subsequent offenses. However, even though it is not at issue in this case, it strongly disagrees with petitioner that "[a]llowing federal agencies to consider an employee's disciplinary record—without regard to pending grievances—also promotes the merit system principles. 5 U.S.C. § 2301." Petitioner's Brief at 12. Rather, it is more analogous to punishing federal employees on the basis of conduct which

does not affect the performance of the employee or others, which is a prohibited personnel practice, if the disciplinary action were reversed by an arbitrator or the MSPB. 5 U.S.C. § 2302(b)(10). It should be noted that not only may prior suspensions be reviewed by arbitrators, but demotions or suspensions of 15 days or more may be appealed directly to the MSPB. 5 U.S.C. § 7121(e)(1); 5 U.S.C. § 7512. Likewise, as the grievance procedures offered by a collective bargaining agreement provide "sufficient procedural protection to employees suspended for 14 days or less," they should be allowed to run their course before the contested action can be relied upon to enhance a subsequent action. *McConnell v. Dep't of the Navy*, 9 M.S.P.R. 22, 25 (1981).

It is also correct that "[n]othing in the CSRA prevents an agency from considering prior disciplinary actions in deciding what discipline is appropriate, even when the prior actions remain subject to grievances." Petitioners' Brief at 13 (emphasis added). However, the court's decision below does not prevent agencies from considering prior disciplinary actions in assessing a penalty in a subsequent case—it only prevents the Board from doing so when there are outstanding grievances. While it is true some delay may occur before the Board can decide a case where there is an outstanding challenge to a prior disciplinary action, this is not an unreasonable price to pay in comparison to what happens when an employee is not allowed to complete such a challenge. He or she is removed, demoted, or receives a long suspension based upon prior contested actions which may never be reviewed by an independent arbitrator.

In fact, as in the instant case, the agency is likely to take the position that the grievant is no longer an agency employee and thus has no access to the negotiated grievance procedure under the collective bargaining agreement. Also, there is little incentive for a labor organization to arbitrate the grievances of those employees who have been removed

and are no longer union members. The labor organization, not the employee, determines which cases it will take to arbitration, and it is unlikely to pursue cases lacking in merit merely to protect employees from possible subsequent, more serious disciplinary actions. 5 U.S.C. § 7114(a)(5).

II. THE COURT OF APPEALS WAS CORRECT IN FINDING THAT THE MSPB'S PRIOR RULE THAT AGENCIES MAY CONSIDER AN EMPLOYEE'S DISCIPLINARY RECORD WITHOUT REGARD TO PENDING GRIEVANCES WAS ARBITRARY AND CAPRICIOUS, OR OTHERWISE CONTRARY TO LAW.

Amicus contends that the MSPB's prior rule, which was invalidated by the court below, was arbitrary and capricious, or otherwise contrary to law. 5 U.S.C. § 7703(c). Therefore, the Federal Circuit's determination should be upheld by this Court as within the parameters of the scope of judicial review of MSPB decisions. In addition, the Federal Circuit's decision, contrary to the petitioner's claim, was motivated by the principle of procedural due process. In *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633 (1974), both the plurality and the concurring opinions found that it was not necessary for a federal employee to have a pre-decision hearing on the merits of his proposed removal before termination, as the opportunity to respond to the charges and the post-termination procedures were adequate to ensure procedural due process:

> Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by the administrative appeals procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause.

Id. at 157 (post-termination hearing procedures provided by the Civil Service Commission and the OEO adequately protect those federal employees' liberty interest.); *id.* at 170 ("[a]fter removal, the employee receives a full evidentiary hearing, and is awarded backpay if reinstated."); *id.* at 178 ("[t]he past cases of this Court uniformly indicate that some kind of hearing is required at some time before a person is finally deprived of his property interests."); *id.* at 179-180, 184-87.

Subsequently, *Arnett v. Kennedy, supra*, was amplified by this Court's landmark decision in *Loudermill v. Cleveland Bd. of Ed.*, 470 U.S. 532, 105 S. Ct. 1487 (1985). It was specifically noted that "[o]ur holding rests in part on the provisions in Ohio law for a full post-termination hearing." *Id.* at 546. The Court then concluded "that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute." *Id.* at 547-48. The due process afforded by the decisions in *Arnett* and *Loudermill* should be contrasted by the lack of due process afforded by the MSPB under its prior rule. Not only are previous disciplinary actions considered in enhancing the penalty in a subsequent case prior to a due process post-disciplinary action hearing, but in some cases, *e.g.*, suspensions of more than 14 days or demotions, the actions themselves entitle the employees to a post-disciplinary action MSPB or arbitration hearing. 5 U.S.C. § 7513; 5 U.S.C. § 7121.

Under the prior MSPB rule, an employee's opportunity to obtain a hearing on her previous disciplinary action(s) would be greatly circumscribed. Even if she were successful, the most that she could hope for is for the Board to reopen its final decision to mitigate the penalty. 5 C.F.R. § 1201.118. Such a truncated procedure does not comport with procedural due process for suspensions of 15 days or

more or demotions and provides little procedural protection for short suspensions and lesser disciplinary actions under the "clearly erroneous" standard of review mandated by the *Bolling* rule. Unlike the prior MSPB rule, the Federal Circuit's decision is not arbitrary or capricious, or contrary to law.

CONCLUSION

For the foregoing reasons stated in this brief, *Amicus* asks this Court to uphold the opinion of the lower court forbidding the MSPB to consider prior disciplinary actions when there are pending appeals or grievances.

Respectfully submitted,

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IN THE

Supreme Court of the United States

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

MARIA A. GREGORY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF THE RESPONDENT, MARIA A. GREGORY

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QUESTION PRESENTED

1. Whether a federal agency may use prior disciplinary actions that are the subject of pending grievance proceedings as a significant or primary basis for disciplining or removing an employee for misconduct pursuant to the Civil Service Reform Act of 1978, 5 U.S.C. §1101 *et seq.*

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BRIEF OF *AMICUS CURIAE* AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF THE RESPONDENT, MARIA A. GREGORY

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 37, written consent of the parties having been obtained in writing and filed with this brief, the American Federation of Government Employees, AFL-CIO, files this brief as *amicus curiae* in support of the Respondent, Maria A. Gregory.

INTEREST OF THE *AMICUS CURIAE* [1]

The American Federation of Government Employees, AFL-CIO ("AFGE") is a labor organization which represents

[1] Pursuant to Rule 37(6) of the Court, AFGE avers that no counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than AFGE, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

approximately 600,000 employees of the federal government. AFGE is the largest labor organization representing non-postal federal employees in nearly every major department and agency of the federal government. In its capacity as exclusive bargaining representative, AFGE negotiates collective bargaining agreements, presents grievances and administrative complaints, including those before the Merit Systems Protection Board ("MSPB" or "Board"), litigates in federal courts, and engages in legislative activity on behalf of the employees it represents.

The United States Court of Appeals for the Federal Circuit has held in *Gregory v. United States Postal Service*, 212 F.3d 1296, 1300 (Fed. Cir. 2000), that, in an adverse action appeal by a federal employee, the Board may not consider prior disciplinary actions that are the subject of ongoing proceedings challenging the merits of those actions. The court reasoned that the legitimacy of the reasonable penalty analysis conducted by the Board would be jeopardized by the consideration of unreliable evidence such as prior actions still pending review. *Id.*

Adverse actions against the federal non-postal employees whom AFGE represents are subject to the same statutory provisions as such actions involving postal employees. *See* 5 U.S.C. § 7511 *et seq.* and 39 U.S.C. § 1005(a)(1). The afore-referenced decision of the Federal Circuit, therefore, affects the adverse action and appeal rights of the hundreds of thousands of federal, non-postal employees represented by AFGE, both in administrative proceedings before the Board under 5 U.S.C. § 7513(d) and in grievance arbitrations pursuant to the Federal Labor-Management Relations Act, 5 U.S.C. § 7121(e). As Respondent argues, the Federal Circuit's decision provides the only workable solution for the management of Board cases. AFGE submits, in this brief, that the Federal Circuit's decision is also the only result that is consistent with the the standards and burden of proof

established by the Civil Service Reform Act of 1978 ("CSRA"), Pub.L. No. 95-454, 92 Stat. 1111 and due process protections afforded to federal employees.

Since the effective date of the CSRA, AFGE has actively protected the statutory rights of federal employees before agencies, the Board, the Federal Labor Relations Authority, arbitrators, and the courts. In this case, AFGE's concern is that the consideration of pending prior disciplinary actions under a clearly erroneous standard violates the CSRA and the due process rights of federal employees. Permitting the consideration of pending prior disciplinary actions so as to substantiate the severity of a subsequent disciplinary penalty also provides agencies with a potentially easy and unlawful means whereby a series of meritless charges against an employee may be used to justify a removal action. The Federal Circuit's decision rightfully prevents this type of abuse, while observing the evidentiary standards established by the CSRA and the due process protections afforded to federal employees.

AFGE is committed to the protection of the constitutional and statutory rights of federal employees, and to obtaining redress for federal employees where rights have been violated. Because the petitioned-from decision directly addressses such issues and would affect any adverse action taken against federal employees, AFGE has a direct and compelling interest in the outcome of this litigation.

STATEMENT OF THE CASE

Amicus adopts Respondent Maria A. Gregory's Statement of the Case.

SUMMARY OF ARGUMENT

The CSRA sets forth the procedures and evidentiary standards for federal employee appeals of adverse actions. Under the CSRA, an agency may remove an employee to

promote the efficiency of the service. 5 U.S.C. § 7513(a). However, if that action is challenged, the agency must prove its decision by a preponderance of the evidence. 5 U.S.C. § 7701(c)(1)(B). In certain cases, the agency relies upon prior disciplinary actions, that are the subject of pending proceedings, to justify a penalty or establish recidivism (as in this case). The Board created in *Bolling v. Dept. of the Air Force*, 9 M.S.P.R. 335 (1981), a three part test with a "clearly erroneous" standard to evaluate the bona fides of prior disciplinary actions which are pending review on appeal but are being used by an agency to support a subsequent disciplinary actions. The *Bolling* test, however, presents two problems.

First, the *Bolling* standard ignores the procedural protections and evidentiary standards established by Congress in the CSRA. *Bolling* impermissibly changes the standard of proof from "preponderance of the evidence" to "clearly erroneous."

The *Bolling* standard further contradicts the CSRA because it incorrectly places the burden of disproving the agency's actions on the employee. Under *Bolling*, the employee must prove to the Board that the prior actions taken by the agency against her were improper. This creates a situation where, if an employee is subjected to a quick series of progressive disciplinary actions culminating in a removal in which the prior actions play a significant role, as in this case, there may be several on-going grievances or other administrative appeals at the same time. If the removal is adjudicated first and in favor of the agency, then the agency may simply move to have the other pending prior disciplinary actions dismissed on the basis that the employee is no longer employed by the agency and, therefore, cannot be afforded the protections of the negotiated grievance system or CSRA. The employee, then, would be denied the opportunity provided by statute or collective bargaining agreement to contest the other dis-

ciplinary actions that the agency used to justify its decision to remove the employee.

Second, the *Bolling* "clearly erroneous" standard invites agency abuse. Contrary to Petitioner's assertion, the Federal Circuit's decision does not provide an incentive for employees to prolong grievance proceedings. Rather, it curtails agency abuse of the system created by *Bolling* wherein, as in the case at bar, in a relatively short period of time, the agency imposes a series of disciplinary actions, and then justifies the removal of the employee based upon those actions, however de minimus or frivolous, leaving the employee to prove that the agency's prior actions were "clearly erroneous." The potential ramifications of such a situation, especially on an employee's constitutional due process rights, are enormous, considering that the agency may subsequently move to have the pending prior disciplinary actions dismissed as moot because the employee has been removed.

The Federal Circuit's decision does not establish a strict rule prohibiting the consideration of prior disciplinary actions that are the subject of pending grievances. To the contrary, the decision is the only result which harmonizes statutory law, an employee's constitutional due process protections, and public policy.

AFGE submits that the Federal Circuit's decision properly requires agencies to prove, under the appropriate standard of proof, the alleged misconduct in prior disciplinary actions that are pending before considering those actions in imposing a penalty in a subsequent adverse action.

ARGUMENT

I. THE FEDERAL CIRCUIT'S RULING IS CONSISTENT WITH THE CIVIL SERVICE REFORM ACT AND THE DUE PROCESS PROTECTIONS PROVIDED TO FEDERAL EMPLOYEES.

Prior to the enactment of the CSRA, the federal civil service personnel management system was, according to then-President Carter, a "maze" that "tolerates poor performance" and "permits abuse of legitimate employee rights." H.R.Rep. No. 1403, 95th Cong., 2d Sess. 2 (1978), *reprinted in*, 1 House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Civil Service Reform Act of 1978*, at 636, 639 (1979). The CSRA was crafted, as a result, to play a dual role in that it provides federal agencies with the means to more efficiently manage the discipline and removal of employees, while strengthening the protection of legitimate employee rights from abusive agency actions. *Cornelius v. Nutt*, 472 U.S. 648, 650-2 (1985). The CSRA also established the Board and provided it with the jurisdiction to enforce the procedural protections accorded to employees and to conduct hearings in adverse action appeals. *Id.*

Federal employees are entitled to certain statutory due process protections.[2] Under the CSRA, federal employees

[2] Federal employees also have a constitutionally protected property interest in continued employment. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Prior to taking adverse action against an employee, an agency must provide due process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985). The most basic process due is notice of the action proposed and an opportunity for a hearing. *Loudermill, 470 U.S.* at 542. This Court has previously recognized that the governmental interests of prompt removals of unsatisfactory employees and avoidance of administrative burdens do not outweigh the employee's due process interests.

must receive advance written notice of the agency's proposed discipline, a reasonable time to answer and produce evidence, representation, and a written decision from the agency with specific reasons for the action. 5 U.S.C. §§ 7503, 7513. In the case of removals, the employee is also entitled to an appeal to the Board. 5 U.S.C. §§ 7513(d), 7701. The due process protections also include requiring the agency to prove an adverse action by a preponderance of the evidence, 5 U.S.C. § 7701(c)(1)(B), and to establish for adverse actions that the agency action is "only for such cause as will promote the efficiency of the federal service." 5 U.S.C. § 7513(a).

In some adverse actions, including removals, the agency uses prior disciplinary actions as a significant or primary factor to determine the penalty in a subsequent disciplinary action. If an employee has challenged the prior disciplinary actions as they occurred, then the adjudication of those actions may still be pending when the agency takes a subsequent disciplinary action against the employee. The Board established in *Bolling v. Dept. of the Air Force*, 9 M.S.P.R. 335 (1981), a framework to consider prior disciplinary actions that are pending when adjudicating a subsequent adverse action.[3]

Under the *Bolling* framework, the Board administrative judge makes a preliminary determination of whether, in taking the prior disciplinary actions, the agency provided the employee with written notice of the action and an opportunity to challenge it, and whether the action was made a matter of record. *Bolling*, 9 M.S.P.R. at 340. If the agency observed these procedures and the employee timely challenged that

Loudermill, 470 U.S. at 542-545. The right to due process is, of course, constitutionally guaranteed.

[3] The Board has adjudicated many cases since *Bolling* that have applied its framework in considering pending prior disciplinary actions. *See e.g. Crawford v. Dept. of Justice*, 45 M.S.P.R. 234, n.1 (1990) (citing cases).

prior action, then the administrative judge defers to the agency's reliance on the prior actions in the subsequent discipline, and conducts a limited review which requires the employee to show that the prior action was clearly erroneous.[4] *Id.* If the agency has not provided these procedures to the employee, then the Board conducts a full, *de novo* review of the prior action.[5] The Board noted that this limited scope of review balanced agency and employee interests: the agency could not use clearly erroneous prior actions to justify a harsher penalty in a subsequent action, and the employee could not, "relitigate issues that either were, or could have been, thoroughly litigated previously." *Id.* The Board, however, contradicted the express statutory scheme of the CSRA in creating the *Bolling* framework.

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[4] The Board created the "clearly erroneous" standard by using the standard for judicial review of agency actions set forth by the Court in *Citizens to Protect Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), to define the "unreasonable, arbitrary or capricious" standard in the former Federal Personnel Manual ("FPM"). *Bolling*, 9 M.S.P.R. at 339. AFGE submits that the Board's reliance on *Overton Park* was misplaced. *Overton Park* was determined in the specific context of the scope of judicial review of agency decisions established by the Administrative Procedures Act ("APA"), 5 U.S.C. § 706. However, the Board, as it has itself noted, is not a court. *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 298 (1981). The Board, when determining the correctness of an adverse action, should not be employing the judicial standards of review established for courts. This is especially true when Congress has directed by statute that the Board should use a particular evidentiary standard, in this case preponderance of the evidence. See *infra*. As the Board stated in *Douglas*, this limited standard of review would do little more than serve as a precursor to any subsequent review performed by an appellate court and ignore the specific standard of proof established by the CSRA. *Douglas*, 5 M.S.P.R. at 298.

[5] If an arbitrator or the Board sets aside the prior action after the Board has adjudicated a subsequent adverse action relying upon that action, Board regulations permit the re-opening of the decision and its reconsideration regarding whether the subsequent agency adverse action remains appropriate. 5 C.F.R. § 1201.118.

In this regard, the use of the *Bolling* "clearly erroneous" standard of review contradicts both the evidentiary standard of proof and the allocation of the burden of proof established by the CSRA. The procedural and substantive protections provided to federal employees by the CSRA place the burden of proof on the agency and define the requisite amount of proof. A plain language reading of the CSRA indicates that the Board, in reviewing the adverse action, sustains the agency's decision only if the *agency* demonstrates by a *preponderance of the evidence* that the employee actually committed the misconduct alleged and that the adverse action promotes the efficiency of the service. 5 U.S.C. §§ 7513(a), 7701(c)(1)(B); 5 C.F.R. §1201.556(a)(1)(ii); *Henry v. Dept. of the Navy*, 902 F.2d 949, 953-4 (Fed. Cir. 1990).[6] The Board regulations define "preponderance of the evidence" as "[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue." 5 C.F.R. § 1201.56. The agency carries this burden of proof on the merits of the appeal, while the employee carries the burden only with respect to jurisdictional and timeliness of the appeal issues, and affirmative defenses. *Id.*

The *Bolling* "clearly erroneous" test, however, ignores this express statutory "preponderance of the evidence" standard set forth by Congress in Section 7701(c)(1)(B). Instead of the agency proving the alleged misconduct in a pending prior action by a preponderance of the evidence, the Board simply reviews the agency action to determine whether it is clearly erroneous. This application of the clearly erroneous standard to pending prior disciplinary actions, not only contradicts the CSRA standard, it also reveals an inconsistency in the Board's reasoning in *Bolling*. The clearly erroneous standard

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[6] The CSRA requires a "substantial evidence" standard of proof for actions based on unacceptable performance or removal from the Senior Executive Service for failure to be recertified. 5 U.S.C. § 7701(c)(1)(A).

is premised on the reasoning that it would prevent employees from relitigating issues. *Bolling*, 9 M.S.P.R. at 340. If that reasoning is correct, then a prior disciplinary action is not "thoroughly litigated previously" if the action continues to be the subject of pending proceedings.

In other words, unless the employee has been provided the full review of the prior disciplinary actions—due process—that she is entitled to, the agency should not consider those prior actions in a subsequent adverse action. For example, in the case at hand, although the first action taken against Ms. Gregory was reversed by an arbitrator, the remaining two actions were never adjudicated. Ms. Gregory, therefore, never "thoroughly litigated" two of the three prior disciplinary actions. Thus, she never received the procedural protections to which she is entitled. At the least, if the *Bolling* framework is correct, then, the Board should have conducted a *de novo* review of those prior actions and required the agency to prove by preponderant evidence whether the prior alleged misconduct occurred and, if so, the reasonableness of the penalty. The importance of a *de novo* review of pending prior actions is compounded when the agency, as it did in this case, contends that the employee is a recidivist and points to the unreviewed prior discipline as its basis for the subsequent adverse action.[7]

Second, the "clearly erroneous" test also impermissibly shifts the burden of refuting the agency's action onto the employee. Under *Bolling*, the employee carries the burden of proof because the Board will discount an agency *action* only if it is clearly erroneous. *Bolling*, 9 M.S.P.R. at 340. The employee, therefore, is placed in the situation of having to

[7] In this respect, Petitioner's gross mischaracterization of Respondent as a "recidivist" based on the three prior disciplinary actions is highly questionable as Petitioner failed to prove the alleged misconduct in the first action and hearings on the legitimacy of the second and third actions were never held.

discredit prior agency discipline, all the while subject to the higher "clearly erroneous" standard. The shift from agency to employee, and "preponderance of the evidence" to "clearly erroneous" eviscerates the fundamental protections statutorily mandated for employees by the CSRA. Instead of the employee being considered innocent of the alleged misconduct until the agency proves otherwise by preponderant evidence, the agency action is presumed to be valid, unless the employee shows it to be clearly erroneous.[8]

The clearly erroneous standard in *Bolling* and its genesis from the arbitrary/capricious standard set forth in the APA and *Overton Park* should be distinguished from the *Douglas* ruling, under which the Board determines whether an agency-selected *penalty* is arbitrary or capricious. Under *Douglas*, the burden of actually proving the offense by preponderant evidence remains upon the agency, in accordance with Section 7701(c)(1)(B). *Douglas*, 5 M.S.P.R. at 299-303.

In *Bolling*, the Board stated that the "clearly erroneous" standard would apply to the actual *action* in personnel appeals. *Bolling*, 9 M.S.P.R. at 340. Thus, instead of the agency proving its prior actions by a preponderance of the evidence, as required by Section 7701(c)(1)(B), the Board determines whether the prior *actions* were "clearly erroneous." *See e.g., Ballew v. Dept. of Army*, 36 M.S.P.R. 400 (1998); *Rewald v. U.S. Postal Service*, 34 M.S.P.R. 13 (1987); *Hubbard v. U.S. Postal Service*, 32 M.S.P.R. 505 (1987); *Freeman v. Dept. of Transp., F.A.A.*, 20 M.S.P.R. 290 (1984). *Bolling* should be distinguished from *Douglas* because the Board, in *Douglas*, did not change or shift the burden of proof for proving the *action*.

[8] Rare is the occasion when the Board has actually found a prior disciplinary action to be clearly erroneous. *See e.g., Eichner v. U.S. Postal Service*, 83 M.S.P.R. 202, 210 (1999).

Congressional intent to place the burden of proof on the agency in federal personnel actions is plainly evident in the language of the CSRA. 5 U.S.C. § 7701(c)(1)(B). *Bolling* contravenes that express language and intent by reaching a result that is contrary to the express provisions of the CSRA and the protections provided to employees under it.[9] In *Gregory*, the Federal Circuit correctly required the Board, in accordance with the CSRA, to sustain agency disciplinary actions only on the basis of actions established by a preponderance of the evidence before the Board, rather than actions the bona fides of which are pending review elsewhere.[10]

II. THE CONSIDERATION OF PRIOR DISCIPLINARY ACTIONS THAT ARE PENDING INVITES ABUSIVE ADVERSE ACTIONS.

The consideration of prior disciplinary actions that are the subject of pending proceedings not only offends an

[9] The Board should not be accorded any deference to its interpretations in *Bolling* as there is no ambiguity in the plain language of the CSRA; Congress has directly spoken on the issue of which party carries the burden of proof as to proving the alleged misconduct in federal employee appeals, and the appropriate standard of proof in such appeals. *See, Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-846 (1984).

[10] The Federal Circuit remanded this portion of the Board's decision for abuse of discretion. *Gregory*, 212 F.3d at 1300. The Federal Circuit may reverse Board decisions that are arbitrary, capricious, an abuse of discretion, not in accordance with law, in violation of required procedures, or unsupported by substantial evidence. 5 U.S.C. § 7703(c). In addition, the Court may take judicial notice of a fact that is not subject to reasonable dispute and capable of accurate and ready determination. The Court may also take judicial notice of proceedings in other forums, especially if involving the same parties. *See e.g., Genentech Inc. v. U.S. Intern. Trade Com'n*, 122 F.3d 1409 (Fed. Cir. 1997). AFGE submits that it is certainly well within the Federal Circuit's authority to take judicial notice of the arbitration decision in the first disciplinary action and remand the case to the Board. *Gregory*, 212 F.3d at 1299.

employee's due process rights, but also invites abusive adverse actions from an agency. For example, an agency can freely subject an employee to a series of minor, but progressive disciplinary actions immediately prior to her removal in order to support the assessment of that removal action. The agency's actions would be protected by the Board's *Bolling* rule, under which prior disciplinary actions receive only a cursory review under a very limited clearly erroneous standard; at the removal hearing, the agency would not carry the burden of proving by a preponderance of the evidence the occurrence of the prior alleged misconduct. *See* supra. After the removal, the agency could move to have any pending prior disciplinary actions dismissed as the employee could no longer receive the protections of the CSRA or collective bargaining agreement due to the removal.[11] Such potential for abuse offends due process and the intent of the CSRA to create a system with specific procedures and evidentiary standards to protect employees from baseless agency actions.

Petitioner ignores this legitimate concern and the violation of fundamental due process rights, however, and instead attempts to paint a nightmarish scenario of employees delaying a removal by grieving prior disciplinary actions. Pet. at 35. Towards this end, Petitioner cites to common provisions in collective bargaining agreements, which rightfully prevent an agency from considering prior discipline that is stale. Petitioner claims that these provisions, in conjunction with the *Gregory* rule preventing the consideration of pending prior disciplinary actions, would prevent an agency from ever considering prior discipline. Pet. at 35-36. These concerns, however, are not supported by *Gregory* and are, in any event, outweighed by the legitimate due process rights of an employee.

[11] There is some indication from the Respondent that this has already occurred in her case. *See* Opp. Cert. at 12.

The Federal Circuit recently commented on the scope of the *Gregory* rule in *Blank v. Dept. of the Army*, 247 F.3d 1225 (Fed. Cir. 2001). The court declined to extend the *Gregory* rule in cases involving complaints of discrimination filed with the Equal Employment Opportunity Commission ("EEOC"). The court did not extend *Gregory* to EEOC complaints because EEOC appeals often take years to resolve, unlike arbitrations or Board proceedings. *Blank*, 247 F.3d at 1230. The Federal Circuit recognized that the CSRA was partly enacted "to give agencies greater ability to remove or discipline expeditiously." *Blank*, 247 F.3d at 1230, *citing*, *Cornelius v. Nutt*, 472 U.S. 648, 662 (1985). The court noted that due to the often-lengthy EEOC process, an agency would be "effectively prohibited from relying on prior disciplinary actions." *Blank*, 247 F.3d at 1230.

Blank indicates that lengthy EEOC proceedings (to which the *Gregory* rule would not apply) should be distinguished from the arbitration and Board proceedings at issue in *Gregory*. Collective bargaining agreements generally require arbitrations to be resolved expeditiously. In the case of the National Association of Letter Carriers, the collective bargaining agreement provides for the possibility of expedited arbitration for disciplinary cases of 14 days suspension or less which do not involve contract interpretation or for any other cases that the parties may mutually determine. Agreement Article 15.4.C. A decision is rendered in less than one week. *Id.* The contract also requires expeditious scheduling of cases which involve removals or suspensions for more than 14 days. *Id.* at 15.4.B. Additionally, the Board's internal guidelines mandate that appeals be resolved within 120 days. MSPB Administrative Judges' Handbook, Chapter 1, Section 2.[12] In this case, Respondent's prior

[12] The Handbook notes, in pertinent part, "The Board's policy is to adjudicate all appeals within 120 days of receipt by the regional office (RO) except for good cause shown."

disciplinary actions most likely would have been adjudicated if the Petitioner had not sought to delay them. *See* Opp. Cert. at 19, n. 12. The potential for delays in prior actions caused by an employee in order to forestall a subsequent removal is not implicated by the facts in this case, the negotiated arbitration provisions in the collective bargaining agreement, or the Board's internal guidelines.

In sum, the *Gregory* rule challenges the *Bolling* framework under which an agency can freely subject an employee to an adverse action without affording that employee due process for any pending prior disciplinary actions that were used as a significant factor in determining the subsequent action. Moreover, *Gregory* also correctly discredits the *Bolling* clearly erroneous standard for reviewing pending prior actions where a decision has not been issued by the trier of fact. The CSRA specifically requires an agency to prove the alleged misconduct by a preponderance of the evidence; the clearly erroneous standard directly contradicts that standard. Legitimate employee rights are harmed by decisions such as *Bolling* and directly contradict Congress' intent to protect employee rights through the procedural protections of statutes such as the CSRA.

CONCLUSION

Based upon the foregoing reasons, *Amicus* American Federation of Government Employees, AFL-CIO, respectfully requests that the Court affirm the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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